TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 306.

MRS. FRANCES E. WATERMAN, WIFE OF CHARLES A. CRANE, APPELLANT,

vs.

THE CANAL-LOUISIANA BANK AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CAROLINE STANNARD TILTON, DECEASED, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED DECEMBER 7, 1908.

(21,434.)

(21,434.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 638.

MRS. FRANCES E. WATERMAN, WIFE OF CHARLES A. CRANE, APPELLANT,

vs.

THE CANAL-LOUISIANA BANK AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CAROLINE STANNARD TILTON, DECEASED, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 15, 1908.

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

No. 13592.

FRANCES E. WATERMAN, Wife of Charles A. Crane, Appellant,
versus
THE CANAL-LOUISIANA BANK & TRUST COMPANY, Executor, ET ALS., Appellees.

In Equity.

E. Howard M'Caleb, Esquire, and E. H. McCaleb, Jr., Esquire, for Appellant.

Miller, Dufour & Dufour, Esqs., for Canal-Louisiana Bank & Trust Co.; Farrar, Jonas, Kruttschnitt & Goldberg, Esqs., for Charity Hospital; Cage, Baldwin & Crabites, Esqs., for Society of Daughters of Charity of St. Vincent de Paul; Victor Leovy, Esq., for Christian Woman's Exchange; J. McConnell, Esq., for Protestant Episcopal Orphan Asylum; J. McConnell and Chas. E. Fenner, Esqs., for St. Anna's Asylum; Buck, Walshe & Buck, Esqs., for the Home for Incurables; H. G. Dupre, Esq., for city of New Orleans; Sam'l McC. Lawrason and Walter Guion, Att'y Gen'l of Louisiana, for Insane Asylum of State of Louisiana, at Jackson, La.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana, New Orleans Division, to the Supreme Court of the United States, returnable within thirty days from the 3rd day of December, A. D. 1908, at the City of Washington, District of Columbia.

TRANSCRIPT OF APPEAL.

1 *Bill of Complaint. Filed September* 11, 1908.

Circuit Court of the United States for the Eastern District of Louisiana, Fifth Circuit.

No. —.

MRS. FRANCES E. WATERMAN, Wife of Charles A. Crane,
versus
CANAL-LOUISIANA BANK & TRUST COMPANY, Executor, ET ALS.

In Equity.

To the Honorable the Judges of the Circuit Court of the United States in and for the Eastern District of Louisiana, Fifth Circuit, New Orleans Division:

Frances E. Waterman, wife of Charles A. Crane, a resident of the City of Chicago, State of Illinois, and a citizen of the State of

Illinois, herein duly joined, authorized and assisted by her said husband, Charles A. Crane, a resident of Chicago, State of Illinois, also a citizen of the State of Illinois, within the meaning of the Statute defining the jurisdiction of this Court, brings this her Bill on her own behalf, against the Canal-Louisiana Bank & Trust Company, Executor of the last will and testament of Caroline Stannard Tilton, deceased, a citizen of the State of Louisiana and an inhabitant of the Eastern District of Louisiana; and also against the Charity Hospital of New Orleans, St. Anna's Asylum, Protestant Episcopal Orphan Asylum, Home for Incurables, Christian Woman's Exchange, State Insane Asylum, of Jackson, Louisiana, City of New Orleans and Louisiana Retreat, conducted by the Society of the Daughters of Charity of St Vincent de Paul, all and each of them being institutions established under the laws of the State of Louisiana, and each of whom are citizens of the State of Louisiana and inhabitants of the Eastern District of Louisiana; and also against Robert Waterman and Frederick Waterman, each of

2 whom are citizens of the State of Louisiana and inhabitants of the Eastern District of Louisiana and thereupon your Oratrix complains and says:

1st. That Caroline Stannard, widow of Frederick W. Tilton, late of the City of New Orleans and State of Louisiana, being possessed of and well entitled unto a considerable personal estate, duly made and published her last will and testament and codicils thereunto annexed, the said will bearing date New Orleans, January 1st, 1908, and the codicils bearing date February 1st and June 10th, 1908, and by said will and codicils the said Caroline Stannard, widow of Frederick W. Tilton, amongst other things and particular legacies to various persons, gave and bequeathed to Robert Waterman the sum of Three Thousand Dollars ($3,000.00); to the said Robert Waterman and his wife fifteen (15) premium bonds; to Frederick Waterman, Three Thousand Dollars ($3,000.00), and to Frederick Tilton Davis, One Thousand Dollars ($1,000.00) and the whole series of No. 5963 premium bonds, as will appear by the said will and codicils or the probate thereof, whereunto your Oratrix for greater certainty craves leave at all times to refer and produces a copy of the same, marked Exhibit "A," herewith filed and made part of this Bill.

2nd. Your Oratrix further shows unto your Honors that the said Caroline Stannard, widow of Frederick W. Tilton, departed this life on or about the 6th day of July, 1908, without revoking or altering her said will, save by the said codicils, or without revoking or altering said codicils, or any part thereof, whereof the Canal-Louisiana Bank & Trust Company, Executor, in said will named, duly proved the same in the proper Court and undertook the Executorship thereof and possessed itself of the personal estate and effects of the said Testatrix to a very considerable amount, and more than sufficient to discharge her just debts, funeral expenses and legacies.

3rd. And your Oratrix further shows unto your Honors that

3 she is the sole surviving niece, Robert and Frederick Waterman and Frederick Tilton Davis the sole surviving nephews

of said Caroline Stannard Tilton, and that there are no other persons within the nearest degree of kinship of the said Testatrix, Caroline Stannard Tilton; and that the said Frederick Tilton Davis resides in the State of Alabama and outside the court's jurisdiction.

4th. Your Oratrix further shows unto your Honors that the said Robert Waterman, Frederick Waterman and Frederick Tilton Davis, legatees, in the said Testatrix's will named, became, entitled to have and receive their said respective legacies so bequeathed to them, as aforesaid, and did receive said legacies, and accordingly and by receiving said bequests, they have thereby renounced the Succession of said Caroline Stannard, deceased widow of Frederick W. Tilton, and by taking said legacies, have renounced all their rights as heirs at law and are estopped and debarred from claiming any portion of the estate undisposed of and render themselves incapable of exercising the rights of legal heirs, under the following provisions of said will, to-wit:

"Should any of the beneficiaries under the will object to the probate thereof, or in any way directly or indirectly contest, or aid in contesting the same, or any of the provisions thereof, or distribution of my estate thereunder, then, and in that event, I annul any bequest heretofore made to such beneficiary, who shall be absolutely barred and cut off from any share in my estate."

That the above recited clause of said will is legal, valid and binding upon said particular legatees and by reason of their renunciation and estoppel, your Oratrix remains sole heir at law of Caroline Stannard Tilton and as such became entitled to the shares which would have gone to Frederick and Robert Waterman and Frederick Tilton Davis of the same degree in the collateral line by right of accretion.

5th. And your Oratrix further shows unto your Honors that said will bequeathed to the Charity Hospital of New Orleans, Two Thousand Dollars ($2,000.00); to St. Anna's Asylum, Two Thousand Dollars ($2,000.00); to Protestant Episcopal Orphan Asylum, Two Thousand Dollars ($2,000.00); Home for Incurables, Two
4 Thousand Dollars ($2,000.00); Home for Insane, Three Thousand Dollars ($3,000.00); Christian Woman's Exchange, One Thousand Dollars ($1,000.00); and that:

"After satisfaction of all the foregoing special legacies and bequests, and after payment of all costs and expenses in settlement of my estate, if I have remaining any besides undisposed of, I will and direct that such residue shall be divided between the beneficiaries of the charitable bequests heretofore made to various institutions, the division to be made pro rata, and in proportion to the amount of the special legacies already made them respectively."

6th. That the bequest to "Home for Insane" of Three Thousand Dollars ($3,000.00) and the pro rata of the residue of the estate coming to said "Home for Insane" have lapsed and the said sum of Three Thousand Dollars ($3,000.00) and the pro rata of the residue have devolved upon your Oratrix as sole heir and next of kin of said Caroline Stannard Tilton.

That at the time of making said will and at the time of the death

of said Testatrix, there was no such institution, or corporation, or person in existence, or known, as "Home for Insane," nor was the said Testatrix capable of incorporating any institution as "Home for Insane" under her said will, nor did she attempt so to do by the provisions thereof, and as there was and is no such institution known as "Home for Insane," the said special legacy of Three Thousand Dollars ($3,000.00) and the pro rata of the residue remain undisposed of, because the said alleged "Home for Insane" has not been able and is incapable of accepting said legacy, by reason of its non-existence, and thereby said sum of Three Thousand Dollars ($3,000.00) and the pro rata or proportion undisposed of devolve upon your Oratrix as sole legal heir and next of kin of said deceased, Caroline Stannard Tilton.

7th. And your Oratrix further shows unto your Honors
5 that the bequest made to the Christian Woman's Exchange and the said pro rata of the residue do not devolve upon said Christian Woman's Exchange, because the bequest of One Thousand Dollars ($1,000) made to said Christian Woman's Exchange is not a charitable bequest and said Christian Woman's Exchange is not one of the various institutions designated or intended by said Testatrix, which is to share in the charitable bequests of the residue.

8th. Your Oratrix further complains and says that the Insane Asylum, a State institution, situated at Jackson, Louisiana, The Louisiana Retreat, conducted by the Society of the Daughters of Charity of St. Vincent de Paul, and the City of New Orleans, each claim and assert the right to take and receive the amount of said lapsed and caducous legacy made to the so called "Home for Insane" and the accessory thereto being a part and proportionate share in the residue of the estate of said deceased, Caroline Stannard Tilton, each of them falsely pretending and asserting that the said Testatrix intended it as one of the beneficiaries of her bounty and as a particular legatee under her will, in place and stead of the unknown "Home for Insane" named therein—but your Oratrix charges and avers and such the truth is (1) that the intention of the Testatrix must be gathered from the will itself wherein there is no ambiguity of expression; (2) that the Testatrix well knew of the existence of all of said claimants for many years prior to her death and the date of her will and of their respective names and location; (3) that none of said claimants to said legacy made to the so called "Home for Insane" are institutions or establishments possessing the characteristics of a home designed to afford the comforts of domestic life to the insane, but, on the contrary, are places either of confinement and detention or hospitals or infirmaries for the treatment and cure, or a place for the temporary detention and reformation of its inmates; (4) that there are no extrinsic facts, relationship or circumstances showing that a different or other person or corporation was intended by the said Testatrix than the unknown, uncertain and unidentified "Home for Insane"
6 mentioned in her will; and (5) that any pretended verbal declarations of said deceased made either before or after

the execution of her last will and testament are wholly unavailing and inadmissible in evidence and cannot be used or given to dispel any supposed obscurity or uncertainty as to the legatee.

9th. Your Oratrix further charges and avers that the amount falling to her as the sole legal heir and next of kin of said Caroline Stannard Tilton, deceased, having the capacity and qualification to take and receive the lapsed and caducous legacy bequeathed to the non-existant, so called "Home for Insane," together with the part and proportionate share in the residue of her estate accessory and appurtenant thereto, exceed the sum of Ninety Thousand Dollars ($90,000.00), which she hereby claims as justly due and coming to her from the estate of said deceased and should be delivered and paid over to her by the Canal-Louisiana Bank & Trust Company, Testamentary Executor.

10th. And your Oratrix further shows unto your Honors that she and she alone as the sole heir and next of kin of Caroline Stannard Tilton is entitled to the sum of Three Thousand Dollars ($3,000.00) caducously bequeathed to "Home for Insane," and she is advised and believes, and so believing, avers that after payment of the special legacies, charges and costs of administration, the residue of the said estate will amount to more than Three Hundred and Fifty Thousand Dollars ($350,000.00), and as heir aforesaid, she is entitled to receive the distributive share or pro rata of said amount which would have gone to the so-called "Home for Insane," and such further amount as should be found to be due after a full accounting by the Executor, the Canal-Louisiana Bank & Trust Company and the other defendants herein. And so it would appear if the said Executor would set forth a full, true and particular account of the personal estate and of every part thereof, and how, in what manner, to whom and for what the same and every part
7 thereof has been or will be applied and disposed of, but which said Executor refuses to do or to make to your Oratrix any satisfaction whatsoever for and in respect of her just demands. But now, so it is, may it please your Honors, that the said Executor, Canal-Louisiana Bank & Trust Company combining and confederating with the Charity Hospital of New Orleans, St. Anna's Asylum, Protestant Episcopal Orphan Asylum, Home for Incurables, Christian Woman's Exchange and divers other persons at present unknown to your Oratrix, whose names when discovered, your Oratrix prays she be at liberty to insert herein with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your Oratrix, the above named defendants absolutely refuse to comply with your Oratrix's demands and at times pretend that the aforesaid caducous legacy of Three Thousand Dollars ($3,000.00) to said so called "Home for Insane" and the pro rata of the residue of the estate which would have gone to said so called "Home for Insane" devolve upon said institutions above named, parties defendant hereto, and at times further pretend that the Christian Woman's Exchange is entitled to share in said residue in proportion to the special legacy of One Thousand Dollars ($1,000.00) bequeathed to said Christian

Woman's Exchange. Whereas your Oratrix charges the contrary of said pretenses to be true and that the pretenses and claims of said defendants absolutely debars them and each of them under the terms, conditions and penal clauses of said will from sharing in such residue; whereupon the pro rata share coming to said charitable institutions and each of them would devolve upon your Oratrix, all of which actings, doings and preterses of the said defendants are contrary to equity and good conscience and tend to the manifest injury, wrong and oppression of your Oratrix in the premises.

In consideration whereof, and for as much as your Oratrix is remediless in the premises under the rules of the common law, and can have adequate relief only in a court of equity where matters of this nature are properly cognizable, to the end, therefore, that the defendants hereinafter named may answer the matters
8 and things hereinbefore set forth as fully and particularly as if the same were herein again repeated and they were thereunto interrogated.

Wherefore, your Oratrix prays that this Court do order, adjudge and decree that (1) that the particular legacy contained in the last will and testament of Caroline Stannard Tilton, deceased, to so-called "Home for Insane" and also the interest of said legatee in the residue or residuum of said Testatrix's estate, be declared caducous, to have lapsed, because of the uncertainty and non-existence of said legatee; (2) that it be further declared and decreed that Robert Waterman and Frederick Waterman have renounced and abandoned all their right, title and interest as heirs of said Caroline Stannard Tilton, deceased, in the said lapsed and caducous legacy made in favor of the so-called "Home for Insane;" (3)) that it be further adjudged and decreed that your Oratrix as the nearest sole heir and next of kin of said Caroline Stannard Tilton, deceased, capable of inheriting, is along entitled to the amount of the caducous and lapsed special legacy bequeathed to the said so called "Home for Insane," for the sum of Three Thousand Dollars ($3,000.00), and to the proportionate share of said non-existing and uncertain legatee in the residue of the estate of said Caroline Stannard Tilton, and that the Canal-Louisiana Bank & Trust Company, Executor of said deceased, Caroline Stannard Tilton, be condemned to pay over and deliver to your Oratrix the whole amount of said caducous, special legacy, together with the proportionate share and interest to said so called "Home for Insane" in the residue of the estate of said deceased remaining after the payment of the particular legacies and the costs of administration of her estate, and for such further sum as the Court may find to be justly due and owing unto your Oratrix as legal heir and next of kin of the said Carolina Stannard Tilton; (4) and that it be further ordered and decreed that the Christian Woman's Exchange is not a charitable institution or entitled as such under said will to participate or receive any share or portion of the residue of the estate of
9 said deceased; (5) and that an account be taken of the personal estate and effects of the said Testatrix coming to

the hands of the said Executor, or of any person or persons by its order or for its use, and also of the said Testatrix's funeral expenses, debts, legacies and costs of administration, and especially showing the residue remaining in the hands of the said Executor after making the aforesaid deduction and that the same may be applied in due course of administration, and that for these purposes, proper directions may be given.

And your Oratrix further prays for all general and equitable relief, as well as all costs.

May it please your Honors to grant unto your Oratrix writs of subpœna to be issued out of and under the seal of this Honorable Court, and directed to said defendants, the Canal-Louisiana Bank & Trust Company, Executor of the last will and testament of Caroline Stannard Tilton, deceased, The Charity Hospital of New Orleans, St. Anna's Asylum, Protestant Episcopal Orphan Asylum, of Jackson Avenue, Home for Incurables, Christian Woman's Exchange, State Insane Asylum, of Jackson, Louisiana, City of New Orleans and Louisiana Retreat, each through their proper officers or representatives; Robert Waterman, Frederick Waterman and Frederick Tilton Davis, commanding said defendants to appear in this Court at some certain date to be therein named to answer in the premises, but not under oath (answers under oath being hereby expressly waived) and to abide by and perform such decrees and orders as may be herein rendered; and your Oratrix prays for such further and other orders as justice may require and the nature of the case admit of.

(Signed) E. H. MCALEB, JR.,
Solicitor for Complainant.

10 *Affidavit.*

On this — day of September, 1908, before me personally appeared, Mrs. Frances E. Waterman, wife of Charles A. Crane, the above named Complainant, who made solemn oath that she had read the foregoing Bill of Complaint, subscribed by her, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

(Signed) MRS. FRANCES E. CRANE.

Sworn to and subscribed before me on this 11 day of September A. D. 1908.

[SEAL.] ARTHUR B. LEOPOLD,
Notary Public.

11 U. S. Circuit Court, Eastern District of Louisiana.

No. 13592.

MRS. FRANCES E. WATERMAN, Wife of Charles A. Crane,
versus
CANAL-LOUISIANA BANK & TRUST COMPANY, Executor, ET ALS.

Will of Caroline Stannard Tilton, Marked "Exhibit."

Filed with Bill of Complaint September 11, 1908.

So help me God, Amen.

NEW ORLEANS, *January 1st,* 1908.

I, Caroline Stannard Tilton, being of sound mind and good bodily health, do by these presents make and publish this my last will and testament, revoking all others.

To my nephews, Robert and Frederick Waterman, each.	$3000.00
To my nephew, Frederick Tilton Davis.....	1000.00
To the four children of Mrs. Charles Crane, of Chicago, Illinois, each	1000.00
To my god-child, Ethelyn Lallande.....	1000.00
To my cousin, Nina Kirby-Smith Buck, of Indianapolis.	3000.00
To the two children of my nephew, Edward N. Waterman, each	1000.00
To my friend, Mrs. Charles Conrad, of New Orleans....	3000.00
To my friend, Charles Conrad Krumbhaar.....	1000.00
To my friend, Gustave T. Beauregard's Memorial Statue.	1000.00
To my niece, Mamie Anderson Willard.....	5000.00
To my friend, Juanita Lallande.....	1000.00
To my friend, Pauline Toby.....	1000.00
To my cousin, Virginia Kirby-Smith, of Mexico.....	3000.00
To my god-child, Caroline Tilton Kirby-Smith, of Mexico.	1000.00
To my god-child, Frances Kirby-Smith Wade, of Los Angeles	1000.00
To my friend, Mrs. Alphonse Le Doux.....	1000.00
To my friend, Mrs. Annie Bousin, of Paris, France.....	3000.00
To my cousin, David Barcley Kirby, of New York.....	3000.00
To my grand-nephew, Frederick Tilton Willard.....	3000.00

which I wish my executors to invest in some desirable security, to be registered in his name, to be used to defray his expenses of tuition to prepare him for the scholarship at the Tulane University, which his father, Charles Willard, holds for him, and which was presented to him for said Tilton Willard, by the administrators of Tulane University.

To my cousin, Carry Kirby-Smith, formerly of Sewanee, I give 1000.00

I give and bequeath to the Board of Commissioners of Audobon Park of New Orleans, the sum of..... 3000.00

to be expended by them in beautifying that portion of the Park that fronts upon the property of the Tulane University.

12 To the memorial to be erected to Gen. Beauregard $1000.00

To the Charity Hospital of New Orleans..... 2000.00

To the St. Anna's Asylum..... 2000.00

To the Protestant Episcopal Orphan Asylum, Jackson Ave., N. O..... 2000.00

To the Home for Incurables..... 2000.00

To the Home for Insane..... 3000.00

To the Christian Woman's Exchange..... 1000.00

After satisfaction of all the foregoing special legacies and bequests, and after payment of all costs and expenses in settlement of my estate, if I have remaining any besides undisposed of, I will and direct that such residue shall be divided between the beneficiaries of the charitable bequests heretofore made to various institutions; the division to be made pro rata, and in proportion to the amount of the special legacies already made them respectively.

Should any of the beneficiaries under the will object to the probate thereof, or in any way directly or indirectly contest, or aid in contesting the same, or any of the provisions thereof, or distribution of my estate thereunder, then and in that event, I annul any bequest heretofore made to such beneficiary, who shall be absolutely barred and cut off from any share in my estate.

I hereby appoint and designate the Canal-Louisiana Bank & Trust Company as my executors, with full seizin to carry out my wishes.

I have no heirs, neither as ascendant or descendant.

Signed this day of our Lord, January 1st, 1908.

CAROLINE STANNARD TILTON,
New Orleans, La.

Codicil No. 1.

To my great niece, Mamie Anderson Willard, I give my cluster diamond breast-pin, given me by my mother, of which I charge her to be careful. At her death I wish it to be given to her aunt, Mrs. Charles Crane, of Chicago, Illinois.

To my friend, Sallie Miles, I give my ring with five diamonds, set in dark blue enamel.

I give to my niece, Mamie Anderson Willard, my initial diamond Cuff Buttons, my initial diamond medallion with gold chain, and such of my laces and wearing apparel as are not otherwise appropriated.

I give my solitaire diamond earrings to my god-child, Caroline

Tilton Kirby-Smith, to be held in charge by her mother, until she attains her seventeenth (17th) birthday.

I give to my friend, Lucie Claiborne, my Point D'adencor collar and lace for sleeves.

I give my Priedieu to Mrs. Walter Rogers.

I give my amethyst breast pin and ring to match, to my cousin, Virginia Kirby-Smith of Mexico.

I give to Charles Willard my piano and music.

13 I give to my friend, Mrs. Henry Preston, my large embroidered screen.

I wish my diamonds, consisting of breast pin and ear-rings, with bracelet set in blue enamel, my diamond breast pin with bracelet set in black enamel, my diamond cross to be sold, the proceeds to be invested in a memorial to my mother to be placed in Grace Church of New Orleans.

I wish to give to my former servants, Mary Henderson	$200.00
Emily Vaton	50.00
Ann Martin	50.00
Louise Williams	50.00

Signed this day of our Lord, February 1st, 1908.

CAROLINE STANNARD TILTON,
New Orleans, La.

Codicil No. 2.

This day of Our Lord, Amen.

February 1st, NEW ORLEANS, LA.

I, Caroline Stannard Tilton, do make this Codicil to my will:

I give and bequeath to Martha Elizabeth Evelyn Gasquet Fenner, 50 Premium bonds of the series No. 5971.

I give to Frederick Waterman's children, 50 Premium bonds of the series 5971.

I give to Mrs. Virginia Kirby-Smith, 50 Premium bonds of the series 5948.

I give to Mamie Anderson Willard, 50 Premium bonds of the series 5948.

I give to Mamie Anderson Willard the whole series of Premium bonds 5961.

I give to Frederick Tilton Davis, the whole series of No. 5963 Premium bonds.

I give to Caroline Tilton Kirby-Smith, whole series of Premium bonds No. 5976.

I give to Frederick Tilton Willard, whole series of Premium bonds No. 5977.

I give to Juanita Lallande, 15 Premium bonds, of series No. 5947.

To Mr. & Mrs. Robert Waterman, 15 Premium bonds of series No. 5947.

To Mrs. Charles Conrad, 20 Premium bonds of series No. 3208.

To Frederick Waterman's children, 9 Premium bonds of series 0001.

14 I give to Gustave Toutant Beauregard, 4 Premium bonds of series No. 3398, and 5 bonds of series No. 0001.

To my great niece, Mamie Anderson Willard, I give my cluster diamond breast-pin, given me by my mother, of which I charge her to be careful; at her death I wish it to be given to her aunt, Mrs. Charles Crane, of Chicago, Ill.

See Codicil No. 1, which is repeated.

Codicil No. 3.

I desire that $20,000.00 shall be deducted from my estate and appropriated toward building a Protestant Episcopal Church to take the place of the present Grace Church, of which the present A. R. Edbrooke is the present Rector, and I request that Mr. Henry Preston and the present vestry will interest themselves in selecting an appropriate site for such building.

Signed this day of Our Lord, February 1st, 1908.

CAROLINE STANNARD TILTON,
New Orleans, La.

So help me God, Amen.

June 10th, 1908, Hot Springs, Va.

I Caroline Stannard Tilton, make this Codicil to my will:

I give and bequeath to my friend, Mrs. Walker Fern, 20 Louisiana State consols, $100.00 each.

(Signed) CAROLINE STANNARD TILTON.

June 10th, 1908, Hot Springs, Va.

15 *Subpœnas Issued to Defendants.*

United States of America:

The President of the United States to the Marshal of the Eastern District of Louisiana, Greeting:

You Are Hereby Commanded to summon The Canal-Louisiana Bank & Trust Company, Executor of the Last Will and Testament of Caroline Stannard Tilton, Deceased, through its Proper Officer or Representative, to appear before the Honorable the Judges of the Fifth Judicial Circuit of the United States of America, at a Circuit Court to be holden on the first Monday of October, 1908, then and there to answer a Bill in Chancery, filed against it and others wherein Mrs. Frances E. Waterman, wife of Charles A. Crane is Complainant and said Canal-Louisiana Bank & Trust Company, executor of the last will and testament of Caroline Stannard Tilton, deceased, and others are Defendants.

Herein fail not, and have you then and there this writ, with your endorsement thereon, how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States of America, this 12th day of September, in the year of our Lord one thousand nine hundred and eight and 133rd year of American Independence.

(Signed) H. J. CARTER, *Clerk*,
By E. M. FULLER, *Deputy Clerk*.

The defendant is hereby notified that it is required to enter its appearance in the Clerk's Office of the United States Circuit Court, on or before the first Monday of October, 1908, otherwise the bill may be taken *pro confesso*.

(Signed) H. J. CARTER, *Clerk*,
By E. M. FULLER, *Deputy Clerk*.

16 *Marshal's Returns on Subpœnas in Chancery.*

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

No. 13592.

Mrs. FRANCES E. WATERMAN
vs.
CANAL-LOUISIANA BANK & TRUST COMPANY, Executor, ET ALS.

Mashal's Return, filed Sept. 14, 1908, on Subpœna in Chancery, issued to the State Insane Asylum of Jackson, La., Sept. 11/1908.

Received by U. S. Marshal, New Orleans, La., Sept. 11/'08, and on the 14th day of the same month and year, I served copy hereof on the State Insane Asylum of Jackson, La., by handing the same to His Excellency, J. Y. Sanders, Governor of the State of Louisiana and President of the said Insane Asylum in person, at the City of New Orleans, La.

VICTOR LOISEL,
U. S. Marshal.
By T. I. GALBRETH,
Deputy U. S. Marshal.

U. S. Circuit Court, Eastern Dist. of La., New Orleans Division.

No. 13592.

Mrs. FRANCES E. WATERMAN
vs.
CANAL-LOUISIANA BANK & TRUST CO.

Marshal's Return, filed Sept. 14, 1908, on Subpœna in Chancery, issued to the St. Anna's Asylum, Sept. 12, 1908.

Received by U. S. Marshal, New Orleans, La., Sept. 12/'08, and on the 14th day of the same month and year I served copy hereof

on St. Anna's Asylum by handing the same to the President thereof, Mrs. T. G. Richardson, in person, in the City of New Orleans, La.

VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH,
Deputy U. S. Marshal.

17 United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

No. 13592.

Mrs. FRANCES E. WATERMAN
vs.
CANAL-LA. BANK & TRUST CO.

Marshal's Return, filed Sept. 14, 1908, on Subpœna in Chancery, issued to Canal-Louisiana Bank & Trust Company, Sept. 12/1908.

Received by U. S. Marshal, New Orleans, La., Sept. 12/1908, and on the same day, month and year I served copy hereof on the Canal-Louisiana Bank & Trust Company, Executor of the last will and testament of Caroline Stannard Tilton, deceased, by handing the same to the 1st Vice President thereof, Hon. Charles Janvier, in person, in the office of said Canal-Louisiana Bank & Trust Company, in the City of New Orleans, La.

VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH,
Deputy U. S. Marshal.

18 U. S. Circuit Court, Eastern Dist. of La., New Orleans Division.

No. 13592.

Mrs. FRANCES E. WATERMAN
vs.
CANAL-LA. BANK & TRUST CO.

Marshal's Return, filed Sept. 14, 1908, on Subpœna in Chancery, issued to Protestant Episcopal Orphan Asylum of Jackson Ave., Sep. 12, '08.

Received by U. S. Marshal, New Orleans, La., September 12, 1908, and on the same day, month and year, I served copy hereof on the Protestant Episcopal Orphan Asylum of Jackson Avenue, by handing the same to Sister Mary, Sister in charge, in person, in the office of said institute in the City of New Orleans, Louisiana.

VICTOR LOISEL,
U. S. Marshal.
By T. I. GALBRETH,
Deputy U. S. Marshal.

19 U. S. Circuit Court, Eastern Dist. of La., N. O. Division.

No. 13592.

Mrs. FRANCES E. WATERMAN
vs.
CANAL-LA. BANK & TRUST CO.

Marshal's Return, filed Sept. 14/'08, on Subpœna in Chancery, issued to Christian Woman's Exchange, Sept. 12/'08.

Received by U. S. Marshal, New Orleans, La., Sept. 12/'08 at 12:00 Noon, and on the same day, month and year I served copy hereof on the Christian Woman's Exchange by handing the same to the Vice President thereof Mrs. Belle H. Perkins, in person, in the office of said Exchange, in New Orleans, La., the President being absent at the time of said service.

VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH,
Deputy U. S. Marshal.

U. S. Circuit Court, Eastern Dist. of La., N. O. Division.

No. 13592.

Mrs. FRANCES E. WATERMAN
vs.
CANAL-LA. BANK & TRUST CO.

Marshal's Return, filed Sept. 14/'08, on Subpœna in Chancery, issued to Home for Insurables, Sept. 12, 1908.

Received by U. S. Marshal, New Orleans, La., Sept. 12, 1908, and on the same day, month and year I served copy hereof on the Home for Incurables by handing the same to the matron and representative thereof, Miss Maud Leethen, in person, in the office of said institute, in the City of New Orleans, Louisiana.

VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH,
Deputy U. S. Marshal.

U. S. Circuit Court, Eastern Dist. of La., New Orleans Division.

No. 13592.

Mrs. FRANCES E. WATERMAN
vs.
CANAL-LA. BANK & TRUST CO.

Marshal's Return, filed Sept. 14, 1908, on Subpœna in Chancery, issued to Charity Hospital, September 12, 1908.

Received by U. S. Marshal, New Orleans, La., September 12, 1908, and on the same day, month and year I served copy hereof on the Charity Hospital by handing the same to the Vice President of the Board of Administrators thereof, Dr. E. S. Lewis, in person, in the City of New Orleans, Louisiana, the President thereof being absent at the time of said service.

VICTOR LOISEL,
U. S. Marshal.
By T. I. GALBRETH,
Deputy U. S. Marshal.

U. S. Circuit Court, Eastern Dist. of Louisiana, New Orleans Division.

No. 13592.

Mrs. FRANCES E. WATERMAN
vs.
CANAL-LA. BANK & TRUST CO.

Marshal's Return, filed Sept. 14, 1908, on Subpœna in Chancery, issued to Frederick Waterman, Sept. 12, 1908.

Received by U. S. Marshal, New Orleans, La., Sept. 12, 1908, and on the same day, month and year I served copy hereof on Frederick Waterman by leaving same at the dwelling house or usual place of abode of the said Frederick Waterman, in New Orleans, Louisiana in the hands of his wife, Mrs. Frederick Waterman, an adult person who is a member or resident in the family of the said Frederick Waterman.

VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH,
Deputy U. S. Marshal.

21 U. S. Circuit Court, Eastern Dist. of La., New Orleans Division.

No. 13592.

Mrs. Frances E. Waterman
vs.
Canal-La. Bank & Trust Co.

Marshal's Return, filed Sept. 14, 1908, on Subpœna in Chancery, issued to Robert Waterman, Sept. 12, 1908.

Received by U. S. Marshal, New Orleans, La., Sept. 12, 1908, and on the same day, month and year I served copy hereof on Robert Waterman by leaving same at the dwelling house or usual place of abode of the said Robert Waterman, in New Orleans, Louisiana, in the hands of his wife, Mrs. Robert Waterman, an adult person who is a member or resident in the family of the said Robert Waterman.

VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH,
Deputy U. S. Marshal.

U. S. Circuit Court, Eastern Dist. of La., New Orleans Division.

No. 13592.

Mrs. Frances E. Waterman
vs.
Canal-La. Bank & Trust Co.

Marshal's Return, filed Sept. 14, 1908, on Subpœna in Chancery, issued to the Society of the Daughters of Charity of St. Vincent de Paul.

Received by U. S. Marshal, New Orleans, La., Sept. 16, 1908, and on same day I served copy hereof on the Society of the Daughters of Charity of St. Vincent de Paul, conducting the Louisiana Retreat by handing the same to Sister Mary Jane, in person in New Orleans, La.

VICTOR LOISEL,
U. S. Marshal,
By T. F. LAICHE, *D'y.*

22 U. S. Circuit Court, Eastern District of La.

No. 13592.

Mrs. FRANCES E. WATERMAN
vs.
CANAL-LA. BANK & TRUST CO.

Marshal's Return, filed Sept. 14, 1908, on Subpœna in Chancery, issued to the City of New Orleans, Sept. 14, 1908.

Received by U. S. Marshal, New Orleans, La., Sept. 12, '08, at 12:00 Noon, and on the 14th day of the same month and year, I served copy hereof on the City of New Orleans by leaving same at the City Hall 'Mayor's office: in the hands of Mr. W. P. Ball, Secretary to the Mayor, in person, in the City of New Orleans, La.

VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH,
Dept. U. S. Marshal.

U. S. Circuit Court, Eastern District of La.

No. 13592.

FRANCES E. WATERMAN
vs.
CANAL-LA. BANK & TRUST CO.

Marshal's Return, filed Sept. 14, 1908, on Subpœna in Chancery, issued to the Louisiana Retreat, Sept. 12, 1908.

Received by U. S. Marshal, New Orleans, La., Sept. 12, 1908, and on the same day, month and year I served copy hereof on the Louisiana Retreat by handing the same to Sister Mary Jane representative of the Sisters of Charity, and in charge of the said institute in person in the hall way of said Retreat, in the City of New Orleans, La.

VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH,
Deputy U. S. Marshal.

23 Extracts from the Chancery Order Book.

Notice of Filing of Bill of Complaint.

FRIDAY, *September* 11, 1908.

No. 13592.

FRANCES E. WATERMAN ET AL.
vs.
CANAL-LA. BANK & TRUST CO., Executor, ET AL.

The Complainant, through her Solicitor, E. H. M'Caleb, Jr., has this day filed a Bill of Complaint herein.

Notice of Filing of Amendment to Bill of Complaint.

WEDNESDAY, *September* 16, 1908.

No. 13592.

FRANCES E. WATERMAN, Wife of Charles A. Crane,
vs.
CANAL-LA. BANK & TRUST COMPANY, Executor, ET ALS.

Notice is hereby given that Frances E. Waterman, wife of Charles A. Crane, through her Solicitor E. H. M'Caleb, Jr., has this day filed an amendment to the Bill of Complaint herein.

24 *Amendment of Bill as to Name. Filed Sept.* 16, 1908.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana, New Orleans Division.

No. 13592.

Mrs. FRANCES E. WATERMAN, Wife of Charles A. Crane,
versus
CANAL-LA. BANK & TRUST CO., Executor, ET ALS.

In Equity.

Now comes Frances E. Waterman, wife of Charles A. Crane, Complainant herein, and stating that there is an error in the name of one of the defendants herein, though properly named in the introductory of the Bill, but not in the prayer for process, now amends Complainant's prayer for process, in compliance with Rule 28 of this Court, by inserting before the words Louisiana Retreat, "Society of the Daughters of Charity of St. Vincent De Paul, conducting," and as thus corrected, a subpœna do issue to said defendant accordingly.

(Signed) E. H. M'CALEB, JR.,
Solicitor for Complainant.

25 *Appearances.*

Extracts from the Chancery Order Book.

MONDAY, *October 5th*, 1908.

13592.

Mrs. FRANCES E. WATERMAN
vs.
CANAL-LA. BANK & TRUST CO.

Now comes the State Insane Asylum of Jackson, Louisiana, one of the defendants herein, through S. McC. Lawrason, & Walter

Guion, Att'y Gen'l, its Solicitors and enters its appearance to the bill of complaint herein.

13592.

Mrs. Frances E. Waterman
vs.
Canal-La. Bank & Trust Co.

Now comes the Christian Woman's Exchange, one of the defendants herein, through Victor Leovy its Solicitor and enters its appearance to the bill of Complaint herein.

13592.

Mrs. Frances E. Waterman
vs.
Canal-La. Bank & Trust Co.

Now comes the City of New Orleans, one of the defendants herein, through its Solicitor H. G. Dupre, Ass't City Attorney, and enters its appearance to the bill of Complaint herein.

No. 13592.

Mrs. Frances E. Waterman, Wife of Charles A. Crane,
vs.
Canal-La. Bank & Trust Company, Executor, et als.

Now comes the Canal-Louisiana Bank & Trust Company,
26 one of the defendants herein, through Miller, Dufour & Dufour, its Solicitors and enters its appearance to the Bill of Complaint herein.

No. 13592.

Mrs. Frances E. Waterman, Wife of Charles A. Crane,
vs.
Canal-La. Bank & Trust Company, Executor, et als.

Now comes the Charity Hospital, one of the defendants herein through Farrar, Jonas, Kruttschnitt & Goldberg, its Solicitors and enters its appearance to the Bill of Complaint herein.

No. 13592.

Mrs. Frances E. Waterman, Wife of Charles A. Crane,
vs.
Canal-La. Bank & Trust Company, Executor, et als.

Now comes the Protestant Episcopal Or-han Asylum, on Jackson Street, one of the defendants herein, through J. McConnell, its Solicitor and enters its appearance to the Bill of Complaint herein.

No. 13592.

Mrs. Frances E. Waterman, Wife of Charles A. Crane,

vs.

Canal-La. Bank & Trust Company, Executor, et als.

Now comes the St. Anna's Asylum, one of the defendants herein through J. McConnell, its Solicitor and enters its appearance to the Bill of Complaint herein.

No. 13592.

Mrs. Frances E. Waterman, Wife of Charles A. Crane,

vs.

Canal-La. Bank & Trust Company, Executor, et als.

Now comes the Home for Incurables, one of the defendants herein, through Buck, Walshe & Buck, and Geo. H. Terriberry, its Solicitor- and enters its appearance to the Bill of Complaint herein.

27 No. 13592.

Mrs. Frances E. Waterman, Wife of Charles A. Crane,

vs.

Canal-La. Bank & Trust Company, Executor, et al.

Now comes the Society of the Daughters of Charity of St. Vincent de Paul, one of the defendants herein, through H. C. Cage, Pierre Crabites and J. P. Baldwin, its Solicitors and enters its appearance to the Bill of Complaint herein.

28 *Notice of Filing of Demurrer by Certain Defendants on October 30th, 1908.*

Extracts from the Chancery Order Book.

Friday, *October 30th*, 1908.

No. 13592.

Mrs. Frances E. Waterman et al.

vs.

Canal-La. Bank & Trust Company, Executor, et als.

Notice is hereby given that the defendants, to wit, the Canal-Louisiana Bank & Trust Company, Executor of the last will of

Caroline Stannard Tilton, the Charity Hospital of New Orleans; the St. Anna's Asylum; the Protestant Episcopal Orphan Asylum on Jackson Avenue; the Home for Incurables; the Christian Woman's Exchange; the State Insane Asylum of Jackson, La.; the City of New Orleans, and the Society of Daughters of Charity of St. Vincent de Paul, through their Solicitors, have this day filed a Demurrer to the Bill of complaint of Frances E. Waterman, wife of Charles A. Crane, Complainant, herein.

29 *Demurrer. Filed October 30th,* 1908.

U. S. Circuit Court, Eastern District of La., at New Orleans.

No. 13592.

MRS. FRANCES E. WATERMAN ET AL.

vs.

CANAL-LOUISIANA BANK & TRUST CO., EXECUTOR, ET ALS.

To the Honorable the Judges of said Court:

Now come the defendants, the Canal-Louisiana Bank & Trust Company, Executor of the last will of Caroline Stannard Tilton, the Charity Hospital of New Orleans, the St. Anna's Asylum, the Protestant Episcopal Orphan Asylum on Jackson Avenue, the Home for Incurables, the Christian Woman's Exchange, the State Insane Asylum of Jackson, La., the City of New Orleans and the Society of Daughters of Charity of St. Vincent de Paul and demur to the bill of complaint of Frances E. Waterman, wife of Charles A. Crane, and for grounds of demurrer say:

1st. That this Honorable Court as a Court of Equity has no power to entertain jurisdiction of the matters and things set forth in said bill of complaint.

2nd. That the matters and things set forth in said bill are of probate cognizance and entirely within the jurisdiction of the Civil District Court of the State of Louisiana, in and for the Parish of Orleans, and this Honorable Court as a Court of Equity of the United States has no jurisdiction to hear, try or determine any of the issues set up in the said bill of complaint.

3rd. That the said bill is without equity because it appears on the face of the will annexed to said bill that the legacy to the Charity Hospital, the St. Anna's Asylum, the Protestant Episcopal Orphan Asylum, the Home for Incurables, the Home for Insane and the Christian Woman's Exchange is a conjoint universal legacy and if the legacies to the Home for Insane have lapsed as averred,
30 the same belong to the other conjoint universal legatees.

Wherefore, defendants pray that this demurrer may be sustained and the said bill be dismissed with costs.

(Signed) MILLER, DUFOUR & DUFOUR,
Solicitors of Canal-La. Bank & Trust Co.
FARRAR, JONAS, KRUTTSCHNITT & GOLDBERG,
Solicitors for Charity Hospital.
CAGE, BALDWIN & CRABITES,
Solicitors for Society of Daughters of Charity of St. Vincent de Paul.
VICTOR LEOVY,
Solicitor for Christian Woman's Exchange.
J. McCONNELL,
Sol. for Pro'st. Ep'l Orphan Asylum on Jackson St.
J. McCONNELL &
CHAS. E. FENNER,
Solicitors for St. Anna's Asylum.
BUCK, WALSHE & BUCK &
GEO. H. TERRIBERRY,
Solicitors for the Home for Incurables.
H. G. DUPRE, *Ass't City Att'y,*
Solicitor for City of New Orleans.
SAM'L McC. LAWRASON,
WALTER GUION, *Att'y General,*
Solicitors for Insane Asylum of State of Louisiana, at Jackson, Louisiana.

R. M. Walmsley, being duly sworn, deposes and says that he is the President of the Canal-Louisiana Bank & Trust Co., Executor of the last will of Caroline Stannard Tilton, one of the defendants, and that the foregoing demurrer is not interposed for the purposes of delay.

(Signed) R. M. WALMSLEY.

Sworn to and subscribed before me this 27th day of October, 1908.

[SEAL.] (Signed) JOHN JANVIER,
Notary Public.

We hereby certify that in our opinion the foregoing demurrer is well founded in law.

(Signed) MILLER, DUFOUR & DUFOUR,
FARRAR, JONAS, KRUTTSCHNITT & GOLDBERG,
CAGE, BALDWIN & CRABITES,
VICTOR LEOVY,
BUCK, WALSHE & BUCK,
GEO. H. TERRIBERRY,
By GEO. C. WALSHE.
H. G. DUPRE,
Solicitors for City of New Orleans.
SAM'L McC. LAWRASON,
WALTER GUION, *Att'y Gen'l,*
Solicitors for State Insane, of State of Louisiana, at Jackson, La.

31 *Entry Setting Down Demurrer for Argument. Filed Nov.* 11, 1908.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana. In Equity.

No. 13592.

Mrs. Frances E. Waterman et al.
versus
Canal-La. Bank & Trust Co. et als.

Now comes the Complainant, Mrs. Frances E. Waterman, wife of Charles A. Crane, through her Solicitor, E. H. M'Caleb, Jr., and sets down the demurrer herein filed by defendant for argument, in compliance with Equity Rule 33.

32 *Order Fixing for Trial Demurrer of Defendant. Filed November 11th,* 1908.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana. In Equity.

No. 13592.

Mrs. Frances E. Waterman et als.
versus
Canal-La. Bank & Trust Co.

On motion of E. H. M'Caleb, Jr., Solicitor for Complainant;
It is ordered, that the argument on the demurrer herein filed by defendant be set down for Monday the 30th day of November, 1908, and that defendants be notified.

33 *Pro Confesso as to Robert & Fred. Waterman. Entered November* 11/1908.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana. In Equity.

No. 13592.

Mrs. Frances E. Waterman et als.
versus
Canal-La. Bank & Trust Co. et als.

On motion of E. H. M'Caleb, Jr., Solicitor for Complainant, and on showing that the defendants, Robert Waterman and Frederick Waterman, have failed to appear, plead demur or answer Complainant's bill within the delay and at the time specified, as prescribed by Rule 16 of the Equity Rules of this Court, and being in default;

It is now ordered, that the Complainant's Bill be taken *pro confesso* against said defendant-, Robert Waterman and Frederick Waterman, and this case be proceeded in *ex parte*.

34 *Order Associating E. H. M'Caleb, Sr., as Counsel.*

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

No. 2142.

Mrs. Frances E. Waterman, Wife of Charles A. Crane.
versus
Canal-Louisiana Bank & Trust Company, Executor, et al.

Now comes the Complainant by E. H. M'Caleb, Jr., her Solicitor, and states to the Court that E. Howard M'Caleb, Sr., has been associated by said Complainant as one of her Counsel in this cause, and moves that proper entry be made thereof.

It is ordered, that the Clerk of Court make minute of same and that said E. H. M'Caleb, Sr., is so associated of record as Counsel for Complainant in this cause.

November 30th, 1908.

35 *Final Decree, Entered November 30th, 1908.*

United States Circuit Court, Eastern District of Louisiana. In Equity.

No. 13592.

Mrs. Frances E. Waterman et al.
vs.
Canal-Louisiana Bank & Trust Company et als.

This cause came on this day to be heard upon the Demurrer to the Bill of Complaint filed by the Defendants, the Canal-Louisiana Bank & Trust Company, Executor of the last will of Caroline Stannard Tilton, the Charity Hospital of New Orleans, the St. Anna's Asylum, the Protestant Episcopal Orphan Asylum, the Home for Incurables, the Christian Woman's Exchange, the State Insane Asylum of Jackson, Louisiana, the City of New Orleans, and the Society of Daughters of Charity of St. Vincent de Paul, and was argued by the Solicitors for the respective parties:

Whereupon, and on consideration thereof, it is now Ordered, Adjudged and Decreed that the said Demurrer be sustained, and that as this Court has no jurisdiction to entertain the Bill herein while the administration of the Succession of Mrs. Tilton is still pending in the Civil District Court for the Parish of Orleans, State of Louisiana, the Bill of Complaint herein be, and is hereby, dismissed with costs.

New Orleans, November 30th, A. D. 1908.

(Signed) EUGENE D. SAUNDERS, *Judge.*

36 *Opinion of the Court. Filed Dec. 2nd, 1908.*

United States Circuit Court, Eastern District of Louisiana.

No. 13592.

Mrs. Frances E. Waterman Crane
vs.
Canal-Louisiana Bank & Trust Co. et al.

Opinion.

I.

The bill avers, in substance—

1. That the complainant, Mrs. Frances E. Waterman Crane, is the sole legal heir of the late Mrs. Caroline Stannard Tilton.

2. That Mrs. Tilton died on July 6, 1908, leaving a last will and testament which has been probated in the proper court, and that the Canal-Louisiana Bank & Trust Co. "duly proved the same in the proper court and undertook the executorship thereof, and possessed itself of the personal estate and effects of the said testatrix to a very considerable amount, and more than sufficient to discharge her just debts, funeral expenses and legacies."

3. The bill further avers that the will left special legacies of stated sums of money to the Charity Hospital, $2,000; to St. Anna's Asylum, $2,000; to Protestant Episcopal Orphan Asylum, $2,000; Home for Incurables, $2,000; Home for Insane, $3,000; and Christian Woman's Exchange $1,000, and that the special bequest of $3,000 to the Home for Insane has lapsed as "there was no such institution, or corporation, or person, in existence, or known as 'Home for Insane,' nor was the said testatrix capable of incorporating any institution as 'Home for Insane' under her said will, nor did
37 she attempt so to do by the provisions thereof, and as there was, and is, no such institution known as 'home for Insane.'"

4. That the will contained this clause:

"After satisfaction of all the foregoing special legacies and bequests, and after payment of all costs and expenses in settlement of my estate, if I have remaining any besides undisposed of, I will and direct that such residue shall be divided between the beneficiaries of the charitable bequests heretofore made to various institutions, the division to be made pro rata, and in proportion to the amount of the special legacies already made them respectively."

5. The bill claims not only, that the bequest to the Home for Insane has lapsed for uncertainty as to said legatee, but also that the Christian Woman's Exchange is not a charitable bequest and that the Christian Woman's Exchange is not to be counted as one of the various institutions designated, or intended by said testatrix which is to share in the charitable bequests of the residue.

6. Accordingly the bill claims, in substance, that there are only five persons entitled to share in the residue of the estate, namely, herself, as sole legal heir, and the Charity Hospital, the St. Anna's Asylum, the Protestant Episcopal Orphan Asylum, and the Home for Incurables. She claims that she is entitled to the lapsed legacy of $3,000, and to the proportion of the residue to which that $3,000 is entitled, after excluding the Christian Woman's Exchange from the residuary legatees.

It is averred that the residue exceeds $350,000, and that complainant is entitled to recover over $90,000 of this, by virtue of her above stated rights, and that the executor ought to be condemned to pay her this sum.

She avers that the executor refuses to pay her this sum,
38 and she therefore brings this suit wherein she prays,

1. That this court decree that the particular legacy of $3,000 left by Mrs. Tilton to the Home for Insane has lapsed because of the uncertainty and non-existence of said legatee.

2. That petitioner be decreed to be the sole legal heir of Mrs. Tilton.

3. That as such sole legal heir she be decreed to be alone entitled to the said lapsed special legacy of $3,000 bequeathed to the said so-called Home for Insane, and to the proportionate share in the residuum which the testatrix intended should go to said non-existing and uncertain legatee. And that said executor be condemned to pay over and deliver to your oratrix the whole amount of said lapsed special legacy "together with the proportionate share and interest to said so-called Home for Insane in the residue of the estate of said deceased remaining after the payment of the particular legacies and the costs of administration of her estate and for such further sum as the court may find to be justly due and owing unto your oratrix as the legal heir and next of kin of the said Caroline Stannard Tilton."

4. That it be further ordered and decreed that the Christian Woman's Exchange is not a charitable institution, or entitled as such under said will to participate or receive any share or portion of the residue of the estate of said deceased.

5. That an account be taken of the personal estate and effects of the said deceased coming to the hands of said executor or of any person, or persons by its order or for its use, and also of the said Testatrix's funeral, debts, legacies and costs of administration, and especially showing the residue remaining in the hands of the said executor after making the aforesaid deduction, and that the
39 same may be applied in due course of administration, and that for these purposes, proper directions may be given."

A copy of the will is annexed to the bill as part thereof.

To this bill a demurrer was interposed averring,

1. That this court, as a court of equity, is without jurisdiction of the matters set forth in the bill.

2. That the matters and things set forth in said bill are of probate cognizance and entirely within the jurisdiction of the Civil District Court in and for the Parish of Orleans, and this Honorable

Court, as a court of equity of the United States, has no jurisdiction to hear, try, or determine, any of the issues set up in said bill of complaint.

3. That the bill is without equity because it appears on the face of the will annexed to the said bill that the legacy to the Charity Hospital, the St. Anna's Asylum, the Protestant Episcopal Orphan Asylum, the Home for Incurables, the Home for Insane, and the Christian Woman's Exchange, is a conjoint universal legacy and if the legacy to the Home for Insane has lapsed as averred, the same applies to the other conjoint universal legatees.

The complainant alleges that she is now the sole legal heir of Mrs. Tilton, and she insists that, under her construction of the law and of the terms of Mrs. Tilton's will, there is an undisposed interest in Mrs. Tilton's succession, to which, she, complainant, is entitled as sole heir.

The executor of the will refuses, however, to recognize that complainant is entitled, under the law and under the terms of the will, to any part of Mrs. Tilton's estate. In this situation there is a controversy between complainant and the executor as to
40 the proper construction of the will and as to whether complainant has or has not any interest in the succession.

The succession has been opened in the proper State Court, and is now being regularly administered therein. That court, through its officer, a duly qualified executor, to whom the will gave '*full seizin*', has possession of all the property composing the succession. In the administration of the succession, the State Court not only has jurisdiction to construe the will, but is under the necessity of doing so, in order to determine who are the special legatees and who are the residuary legatees to whom the residuum of the estate shall be delivered after payment of the debts and special legacies. The State Court has also jurisdiction to determine who are the creditors of the succession, and to adjust the costs and expenses of the administration.

The complainant herein files this bill wherein she asserts against the executor and the other residuary legatees her claim of right in and to a part of the succession, and prays this Court, *first*, to decree that her alleged title is good and valid, and, *second*, to go on and determine the amount of the debts due by the succession, and to fix the costs and expenses of the administration, and to order an accounting and distribution. That is, she demands, not only that this Court shall determine, as between her and the executor and residuary legatees, the validity of her alleged title to a part of Mrs. Tilton's succession, but she also demands, in effect, that the entire administration of that succession shall be transferred from the State Court, in which it is now pending, into the Federal Court. The State Court is to be stripped of all power to do a single act of administration, and is simply to be relegated to the position of a stakeholder, and to be ordered and compelled to distribute the succession to such special legatees, residuary legatees and creditors as this Court shall find to be entitled. This is certainly a novel and extraordinary pro-
41 ceeding.

The jurisdiction of this court is invoked solely on the

ground of diversity of citizenship—the complainant being a citizen of Illinois, and the defendants citizens of Louisiana. It is not alleged that complainant is deprived of any right secured by Federal Law. She seeks, in the Federal Court, the same substantive rights which would be accorded her in the State Court. The sole question is which Court shall adjudicate upon her rights. It is not intimated that either court would apply a different rule from that which would be applied in the other Court.

Then has the Circuit Court for the Eastern District of Louisiana any jurisdiction to entertain this bill, and to remove the administration of Mrs. Tilton's succession out of the Civil District Court for the Parish of Orleans, and itself to administer that succession?

To ask the question is to answer it. No Federal Court has jurisdiction to remove an entire succession administration from a State Court, as the bill in this case proposes to do. The State Court acted first, and, under the Law of Louisiana, has the entire estate in its possession and its administration, and it is entitled to proceed with that administration until it shall be completed. If complainant's contention is correct, then a non-resident creditor of an estate in the hands of a receiver appointed by a State Court, could file a suit in a Federal Court against the State Court receiver and request the Federal Court, not only to pass upon the litigated claim, but further to fix the costs and expenses of the State Court receivership, to determine who were the creditors of the estate, to settle the amount for distribution and the rank and order in which the creditors should be paid, and to direct the receiver to account to the Federal Court and not to the State Court.

No precedent for this remarkable action can be found.
42 Counsel for complainant insist, however, that the decision in *Byers v. McAuley*, 149 *U. S.* 608 is authority for this proceeding. But in the subsequent case of *Farrell v. O'Brien*, 199 *U. S.* 89, the Supreme Court, at p. 109, say of the decision in *Byers v. McAuley*,

"In *Byers v. McAuley*, 149, *U. S.* 608, it was decided that a Federal Court cannot exercise original jurisdiction in respect to the administration of a decedent, and that it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it."

But in the present case the complainant is asking a Federal Court to do the precise things which the Supreme Court says the case of *Byers v. McAuley* declared that no Federal Court could do. The prayer of the bill asks, among other things, that

"an account be taken of the personal estate and effects of the said textatrix coming to the hands of the said executor, or of any person or persons by its order or for its use, and also of the said testatrix's funeral expenses, debts, legacies and costs of administration, and especially showing the residue remaining in the hands of said executor after making the aforesaid deduction and that the same may be applied in due course of administration, and that for these purposes, proper directions may be given."

Manifestly the foregoing is an attempt to have a Federal Court determine all claims against or to the succession of Mrs. Tilton, and this attempt is made in a suit against the executor, and on no other ground than that the complainant has sued the executor. The cases cited above sufficiently show, in my opinion, that this court is without jurisdiction to entertain the suit as propounded by the complainant.

In several cases decided by the Supreme Court of the United States, notably in *Lawrence v. Nelson*, 143 *U. S. at p.* 223,
43 there are found statements to the effect that

"the general equity jurisdiction of the Circuit Court of the United States to administer as between citizens of different States the assets of a deceased person within its jurisdiction, cannot be defeated or impaired by laws of a State undertaking to give exclusive jurisdiction to its own courts."

And in *Hayes v. Pratt*, 147 *U. S. at p.* 570—

"Certainly no such statutes can defeat or impair the general equity jurisdiction of the Circuit Court of the United States to administer as between citizens of different States the assets of a deceased person within its jurisdiction."

These cases seem to assert very broadly that the Circuit Courts of the United States have a power to administer as between citizens of different States, assets of a decedent within the jurisdiction of the court. Conceding that such power is vested in the Circuit Court of the United States, it will be admitted that the power to administer the assets of decedents is primarily vested in the State Courts and is usually exercised by those Courts.

These cases can hardly be taken to mean that the power of administration lodged in the Circuit Courts of the United States is so paramount in its nature that the Circuit Courts of the United States when called upon to exercise it can take property from the State Courts which those Courts have certainly a concurrent power to administer and which they are actually engaged in administering. This would be violative of the principles of comity which exist between the Federal and the State Courts, and would be in conflict with the well settled rules that obtain in respect to the administration of estates generally, whether that administration is conducted by an executor, by an administrator, by a liquidator, or by a receiver. In any of these cases, the court which first obtains jurisdiction and is proceeding in the regular exercise of that jurisdiction, has the unquestioned right to retain in its possession the property which it has begun to administer, free from any interference or control by other courts.

44 I have examined the authorities cited in complainant's brief, and I do not find any of them pertinent to the issues raised in this case.

For the reason given, namely, on the second ground of the demurrer, the bill must be dismissed with costs. If this Court had jurisdiction at all, the suit would have been properly brought on the equity side of the Court. I express no opinion on the third ground of the demurrer.

45 *Motion and Order for Appeal.*

Made in Open Court and Entered and Filed December 3, '08.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana, New Orleans Division.

No. 13592.

FRANCES E. WATERMAN, Wife of Charles A. Crane,
versus
CANAL-LOUISIANA BANK & TRUST COMPANY, Executor, ET ALS.

On motion of E. Howard M'Caleb, Sr., and E. Howard M'Caleb, Jr., Solicitors for Frances E. Waterman, wife of Charles A. Crane, Complainant, made in open Court, suggesting that the said Complainant is aggrieved by the final decree herein made on November 30th, 1908, sustaining defendant's demurrer and dismissing Complainant's bill for want of jurisdiction, believes there is error therein to her prejudice and desires to appeal therefrom to the Supreme Court of the United States, and has filed an assignment of errors;

It is ordered by the court, that the Complainant, Frances E. Waterman, wife of Charles A. Crane, be granted an appeal from said final decree, dismissing this suit for want of jurisdiction, to the Supreme Court of the United States, to operate as a supersedeas, returnable within thirty days on giving bond in the sum of Two Hundred and Fifty Dollars ($250.00) with surety and conditioned as the law directs.

(Signed) E. D. S.

Dec. 3, '08.

46 *Bond. Filed December 3rd,* 1908.

Know all men by these presents, That we, Frances E. Waterman, wife of Charles A. Crane, as principal, and E. H. McCaleb, Jr., as surety, are held and firmly bound unto The Canal-Louisiana Bank & Trust Company, Executor of the last will and testament of Caroline Stannard Tilton, deceased, Charity Hospital of New Orleans, St. Anna's Asylum, Protestant Episcopal Orphan Asylum, Home for Incurables, Christian Woman's Exchange, State Insane Asylum of Jackson, Louisiana, City of New Orleans, Society of the Daughters of Charity of St. Vincent De Paul, Robert Waterman and Frederick Waterman, in the full sum of Two Hundred and Fifty Dollars ($250.00), to be paid to the said Canal-Louisiana Bank & Trust Company, Executor of the last will and testament of Caroline Stannard Tilton, deceased, Charity Hospital of New Orleans, St. Anna's Asylum; Protestant Episcopal Orphan Asylum, Home for Incurables, Christian Woman's Exchange, State Insane Asylum at Jackson, Louisiana, City of New Orleans, Society of the Daughters of Charity

of St. Vincent De Paul, Robert Waterman and Frederick Waterman, certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 3rd day of December, in the year of Our Lord, one thousand nine hundred and eight.

Whereas, at a Session of the United States Circuit Court, Fifth Judicial Circuit, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between Frances E. Waterman, wife of Charles A. Crane, and the Canal-Louisiana Bank & Trust Company, Executor of the last will and testament of Caroline Stannard Tilton, deceased, Charity Hospital of New Orleans, St. Anna's Asylum, Protestant Episcopal Orphan Asylum, Home for Incurables, Christian Woman's Exchange, State Insane Asylum of Jackson, Louisiana, City of New Orleans, Society of the Daughters of Charity of St. Vincent De Paul, Robert Waterman and
47 Frederick Waterman, No. 13592 of the docket of said Court, a final decree was rendered against the said Frances E. Waterman, wife of Charles A. Crane, sustaining defendant's demurrer and dismissing her bill of complaint for want of jurisdiction in said Circuit Court.

And the said Mrs. Frances E. Waterman, wife of Charles A. Crane, having heretofore, to-wit: on the 3rd day of December, 1908, taken an appeal to the Supreme Court of the United States, from and to reverse the said decree rendered on the 30th day of November, 1908, by the Circuit Court of the United States for the Fifth Circuit holding sessions in and for the Eastern District of Louisiana, in said suit of Frances E. Waterman, wife of Charles A. Crane, *versus* Canal-Louisiana Bank & Trust Company, Executor, *et als.*, No. 13592 of the docket thereof.

Now the condition of the above obligation is, That if, the above bounden, Mrs. Frances E. Waterman, wife of Charles A. Crane, shall prosecute her said appeal to effect, and shall answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void, otherwise to remain in full force and virtue.

(Signed) FRANCES E. CRANE.
E. H. McCALEB, JR.

Signed, sealed and delivered in the presence of
(Signed) WYNNE G. ROGERS.
L. L. LABATT.

Approved by
(Signed) EUGENE D. SAUNDERS, *Judge.*

47½ UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Personally appeared, E. H. McCaleb, Jr., who being duly sworn, deposes and says that he is the surety on the within bond, that he resides in the City of New Orleans and is worth the full sum of

Two Hundred and Fifty Dollars ($250.00), over and above all his debts and liabilities and property exempt from execution.

(Signed) E. H. McCALEB, Jr.

Subscribed and sworn before me this 3rd day of December, 1908.

[SEAL.] (Signed) H. J. CARTER,
U. S. Commissioner, Eastern District of Louisiana.

48 *Assignment of Errors. Filed December 3rd,* 1908.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana, New Orleans Division.

No. 13592.

FRANCES E. WATERMAN, Wife of Charles A. Crane,
versus
CANAL-LOUISIANA BANK & TRUST COMPANY, Executor, ET ALS.

Comes now Frances E. Waterman, wife of Charles A. Crane, by her Counsel, and respectfully represents that she feels aggrieved by the final decree of the Court in the above entitled and numbered cause, and assigns error thereto, as follows:

1st. The Court erred in holding that the said Circuit Court was without jurisdiction over this cause.

2nd. The Court erred in sustaining defendant's demurrer and dismissing Complainant's Bill of Complaint for want of jurisdiction.

3rd. The Court erred in holding that the United States Circuit Court had no jurisdiction to entertain the bill herein whilst the Succession of Mrs. Caroline Stannard Tilton is still pending in the Civil District Court for the Parish of Orleans, State of Louisiana.

4th. The Court erred in failing and refusing to overrule defendant's demurrer.

Wherefore, the said Frances E. Waterman, wife of Charles A. Crane, prays the Honorable Court to examine and correct the errors assigned and for a reversal of the judgment and decree of the Honorable the Circuit Court of the United States for the Eastern District of Louisiana entered in the above entitled cause.

(Signed) E. HOWARD M'CALEB,
E. H. McCALEB, Jr.,
Solicitors for Complainant.

49 *Certificate. Filed December 3rd,* 1908.

United States Circuit Court, Fifth Circuit, Eastern District of Louisiana, New Orleans Division.

No. 13592.

FRANCES E. WATERMAN, Wife of Charles A. Crane, Appellant,

versus

CANAL-LOUISIANA BANK & TRUST COMPANY, Executor, ET AL., Appellee.

A final decree having been entered in this cause, sustaining defendant's demurrer and dismissing complainant's bill, on the 30th day of November, 1908, and an appeal having been taken therefrom to the Supreme Court of the United States, it is hereby certified to the said Supreme Court of the United States that the sole and only question decided and determined by said decree is and was as to the want of jurisdiction of this Court to entertain and determine the questions and issues arising herein.

New Orleans, La., December 3d, 1908.

(Signed) EUGENE D. SAUNDERS, *Judge.*

50 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Henry J. Carter, Clerk of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, Do Hereby Certify, That the foregoing 49 pages contain and form a full, complete, true and perfect transcript of the Record and Proceedings had, on the trial of the case of Mrs. Frances E. Waterman, Wife of Charles A. Crane, Complainant, *vs.* Canal-Louisiana Bank & Trust Company, Executor, *et al.*, Def's, No. 13592 of the Docket of the said Court.

Witness my hand and the seal of said Court, at the City of New Orleans, this 4th day of December A. D., 1908.

[Seal U. S. Circuit Court for the 5th Circuit, Eastern District of La.]

H. J. CARTER, *Clerk.*

I, Don A. Pardee, United States Judge for the Eastern District of Louisiana, do certify, that Henry J. Carter, whose name is signed to the above certificate as Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, was, at the time of signing said certificate, and is now the Clerk of said

Court: That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such Clerk.

Given under my hand, at the City of New Orleans, in said district, this 4th day of December A. D., 1908.

DON A. PARDEE, *Judge.*

Endorsed on cover: File No. 21,434. E. Louisiana C. C. U. S. Term No. 638. Mrs. Frances E. Waterman, wife of Charles A. Crane, appellant, *vs.* The Canal-Louisiana Bank & Trust Company, executor of the last will and testament of Caroline Stannard Tilton, deceased, *et al.* Filed December 7th, 1908. File No. 21,434.

Supreme Court of the United States.

OCTOBER TERM. 1908

NO. 638.

MRS. FRANCES E. WATERMAN, WIFE OF CHARLES A. CRANE, APPELLANT,

versus

THE CANAL-LOUISIANA BANK AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CAROLINE STANNARD TILTON, DECEASED, ET ALS.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Comes the said appellant and moves the Honorable Court to advance this cause upon the docket and to hear it under the provisions of Rule 32 of the rules of this Court, and for reasons therefor, she states:

That this suit was instituted in the United States Circuit Court for the Eastern District of Louisiana, sitting in equity, by complainant, a citizen of Illinois, and against defendants, citizens of Louisiana, to establish her claim as heir of Caroline Stannard Tilton, deceased, in and to a lapsed legacy of $3,000, and $90,000 in the residue of said Mrs. Tilton's estate. The defendants appeared and filed three demurrers, first to the jurisdiction of the Court as a Court of Equity; second to the jurisdiction of the Court as a Federal Court, and, third, to the merits of the bill. After a hearing, the Circuit Court sustained the second stated demurrer, which reads as follows:

> "That the matters and things set forth in said bill are of probate cognizance and entirely within the jurisdiction of the Civil District Court of the State of Louisiana, in and for the Parish of Orleans, and this Honorable Court as a Court of Equity of the United States has no jurisdiction to hear, try or determine any of the issues set up in the said bill of complaint."

From the final decree dismissing the suit for want of jurisdiction, an appeal was taken to this Court, which, together with the certificate and assignment of errors was duly lodged here. For a more complete statement of the case, we annex hereto and make part hereof, the brief or printed argument required by the rules of this Court.

Wherefore this cause should be advanced and heard under Rule 32.

Respectfully submitted,

E. Howard McCaleb

E. Howard McCaleb Jr.

For Appellant.

To Messrs. Miller, Dufour & Dufour and William C. Dufour, Attorneys for Canal-Louisiana Bank and Trust Co.

Farrar, Jonas, Kruttschnitt & Goldberg and E. H. Farrar, Attorneys for Charity Hospital.

Cage, Baldwin & Crabites and Pierre Crabites, Attorneys for Society of Daughters of Charity of St. Vincent de Paul,

Victor Leovy, Attorney for Christian Woman's Exchange.

J. McConnell, Attorney for Protestant Episcopal Orphan Asylum, on Jackson avenue.

J. McConnell and Charles E. Fenner, Attorneys for St. Anna's Asylum.

Buck, Walshe & Buck, Charles F. Buck and George H. Terriberry, Attorneys for the Home for Incurables.

H. G. Dupre, Assistant City Attorney, Attorney for the City of New Orleans.

Samuel McC. Lawrason and Walter Guion, Attorney General, Attorneys for Insane Asylum of State of Louisiana, at Jackson, Louisiana.

You are hereby notified that the appellant in the above named cause will, on the 15th day of February, 1909, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as Counsel can be heard, submit for the consideration of the Court the foregoing motion and the brief thereon, hereto attached.

Edward M'Caleb

E. Howard M'Caleb Jr

For Appellant.

E. Howard McCaleb, Jr., being duly sworn, deposes and says, that on the 21st day of January 1909, he served copies of the foregoing motion upon Miller, Dufour & Dufour and William C. Dufour, attorneys for Canal-Louisiana Bank and Trust Company; Farrar, Jonas, Kruttschnitt & Goldberg and E. H. Farrar, attorneys for Charity Hospital; Cage, Baldwin & Crabites and Pierre Crabites, attorneys for Society of Daughters of Charity of St. Vincent de Paul; Victor Leovy, Attorney for Christian Woman's Exchange; J. McConnell, attorney for Protestant Episcopal Orphan Asylum, on Jackson avenue; J. McConnell and Charles E. Fenner, attorneys for St. Anna's Asylum; Buck, Walshe & Buck, Charles F. Buck and George H. Terriberry, attorneys for the Home for Incurables; H. G. Dupre, Assistant City Attorney, attorney for the City of New Orleans; Samuel McC. Lawrason and Walter Guion, Attorney General, attorneys for Insane Asylum of State of Louisiana, of Jackson, Louisiana, by delivering the same to each of the above named attorneys of record in person save that the said Samuel McC. Lawrason, attorney aforesaid was served by a deposit of a copy of this motion, notification and brief in the United States mail, duly post-paid to his proper address, in full compliance with Rule 6.

Sworn to and subscribed before me this 21st day of January, A. D. 1909.

E. Howard McCaleb

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1908.

NO. 638.

MRS. FRANCES E. WATERMAN, WIFE OF CHARLES A. CRANE, APPELLANT,

versus

THE CANAL-LOUISIANA BANK AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CAROLINE STANNARD TILTON, DECEASED, ET ALS.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANT.

Complainant and appellant, a citizen of Illinois, filed her bill in the United States Circuit Court for the Eastern District of Louisiana against defendants and appellees, all citizens of Louisiana, claiming as legal heir and next of kin the lapsed and caducous legacy made by Caroline Stannard Tilton, deceased, in favor of Home for Insane. She avers (1) that Caroline Stannard Tilton executed and published her last will, by which she bequeathed a number

of particular legacies to different persons and bequeathed to Robert Waterman $3,000, Robert Waterman and his wife, 15 premium bonds; Frederick Waterman, $3,000; to Frederick Tilton Davis, $1,000, and the whole series of No. 5963 premium bonds; (2) that Caroline Stannard Tilton died on July 6, 1908, without revoking or altering her said will, save by certain codicils, or without revoking or altering said codicils or parts thereof. That the Canal-Louisiana Bank and Trust Company, the executor named in said will, probated the same in the proper court, undertook the executorship thereof, and possessed itself of the personal estate of the testatrix more than sufficient to discharge her just debts, funeral expenses and legacies. (3) That complainant is the sole surviving niece, Robert and Frederick Waterman and Frederick Tilton Davis, the sole surviving nephews of said testatrix, and that there are no other persons within the nearest degree of kinship of the said testatrix, and that the said Frederick Tilton Davis resides in the State of Alabama, outside of the Court's jurisdiction. (4) That Robert and Frederick Waterman and Frederick Tilton Davis, legatees, have received their respective legacies, and by doing so have renounced the succession of said Caroline Stannard Tilton and all their rights as heirs at law and are estopped from claiming any portion of the estate undisposed of and rendered themselves incapable of exercising the rights of legal heirs, because of the following provision in the will, to-wit:

> "Should any of the beneficiaries under the will object to the probate thereof, or in any way, directly or indirectly, contest or aid in contesting the same, or any of the provisions thereof, or distribution of my estate thereunder, then and in that event, I annul any be-

quest heretofore made to such beneficiary, who shall be absolutely barred and cut off from any share in my estate."

That the above recited clause of said will is legal and binding upon the particular legatees and by reason of their renunciation, complainant remains sole heir at law of Caroline Stannard Tilton, deceased, and as such entitled to the shares which would have gone to Robert and Frederick Waterman and Frederick Tilton Davis of the same degree in the collateral line by right of accretion. (5) That said will bequeathed to the Charity Hospital of New Orleans $2,000; St. Anna's Asylum, $2,000; Protstant Episcopal Orphan Asylum, $2,000; Home for Incurables, $2,000; Home for Insane, $3,000; Christian Woman's Exchange, $1,000; and that:

"After satisfaction of all the foregoing special legacies and bequests, and after payment of all costs and expenses in settlement of my estate, if I have remaining any besides undisposed of, I will and direct that such residue shall be divided between the beneficiaries of the charitable bequests heretofore made to various institutions, the division to be made pro rata, and in proportion to the amount of the special legacies already made them respectively."

(6) That the bequest to the Home for Insane for $3,000 and the pro rata of the residue of the estate to said Home for Insane, have lapsed, and the said sum of $3,000 and the pro rata of the residue have devolved upon Complainant as sole heir and next of kin of said Testatrix. That, at the time of making said will and at the time of the death of said Testatrix, there was no such institution, corporation or person in existence known as Home for

Insane, and no such institution or person capable of accepting said legacy. (7) That the Christian Woman's Exchange, one of the legatees, is not entitled to share in the residue, because it is not a charitable bequest, and is not a charitable institution. (8) That the Insane Asylum, a State institution, at Jackson, Louisiana; the Louisiana Retreat, in the City of New Orleans, and the City of New Orleans, asserting the right to take and receive the amount of the lapsed and caducous legacy and the accessory thereto, are, for the reasons stated, not entitled to said lapsed and caducous legacy. (9) That Complainant, as sole heir and next of kin of the Testatrix, having the capacity to receive the lapsed and caducous legacy bequeathed to the non-existant Home for Insane, together with the part or proportion in the residue of the estate accessory thereto, exceeds the sum of $90,000 which she claims is justly due and coming to her and should be paid over to her by the Testamentary Executor. (10) That Complainant, as sole heir and next of kin of the Testatrix, is entitled to the sum of $3,000, caducously bequeathed to the Home for Insane, and she is advised and believes that, after the payment of the special legacies, charges and costs of administration, the residue of the estate will amount to more than $350,000, and, as heir, she is entitled to receive the distributive share of said amount which would have gone to the so-called Home for Insane, and such further amount as shall be found after a full accounting by the Executor, and so it would appear if the Executor would set forth a full, true and particular account.

Complainant prays that:

"The Court do order, adjudge and decree that (1) the particular legacy contained in the last will and testament of Caroline Stannard Tilton, deceased, to so-called 'Home for Insane,' and also the interest of said legatee in the residue or residuum of said Testatrix's estate, be declared caducous, to have lapsed, because of the uncertainty and non-existence of said legatee; (2) that it be further declared and decreed that Robert Waterman and Frederick Waterman have renounced and abandoned all their right, title and interest as heirs of said Caroline Stannard Tilton, deceased, in the said lapsed and caducous legacy made in favor of the so-called 'Home for Insane; (3) that it be further adjudged and decreed that your oratrix, as the nearest sole heir and next of kin of said Caroline Stannard Tilton, deceased, capable of inheriting, is alone entitled to the amount of the caducous and lapsed special legacy bequeathed to the said so-called 'Home for Insane,' for the sum of three thousand dollars ($3,000.00), and to the proportionate share of said non-existing and uncertain legatee in the residue of the estate of said Caroline Stannard Tilton, and that the Canal-Louisiana Bank and Trust Company, Executor of said deceased, Caroline Stannard Tilton, be condemned to pay over and deliver to your oratrix the whole amount of said caducous, special legacy, together with the proportionate share and interest to said so-called 'Home for Insane,' in the residue of the estate of said deceased remaining after the payment of the particular legacies and the costs of administration of her estate, and for such further sum as the Court may find to be justly due and owing unto your oratrix as legal heir and next of kin of the said Caroline Stannard Tilton; (4) and that it be further ordered and de-

creed that the Christian Woman's Exchange is not a charitable institution, or entitled as such under said will, to participate or receive any share or portion of the residue of the estate of said deceased; (5) and that an account be taken of the personal estate and effects of the said Testatrix coming to the hands of the said Executor, or of any person or persons by its order or for its use, and also of the said Testatrix's funeral expenses, debts, legacies and costs of administration, and especially showing the residue remaining in the hands of said Executor after making the aforesaid deduction, and that the same may be applied, in due course of administration, and that, for these purposes, proper directions may be given."

And she prayed for subpœnas upon the several defendants.

The will and codicils are annexed to and made part of the bill. Subpœnas were issued and served upon the defendants. They appeared and filed a demurrer as follows:

"Now come the defendants, the Canal-Louisiana Bank and Trust Company, Executor of the last will of Caroline Stannard Tilton; the Charity Hospital of New Orleans, the St. Anna's Asylum, the Protestant Episcopal Orphan Asylum on Jackson avenue, the Home for Incurables, the Christian Woman's Exchange, the State Insane Asylum, of Jackson, La.; the City of New Orleans and the Society of the Daughters of Charity of St. Vincent de Paul, and demur to the Bill of Complaint of Frances E. Waterman, wife of Charles A. Crane, and, for grounds of demurrer, say:

"First. That this Honorable Court, as a Court of Equity, has no power to entertain jurisdiction of the matter and things set forth in said bill of complaint.

"Second. That the matters and things set forth in

said bill are of probate cognizance, and entirely within the jurisdiction of the Civil District Court of the State of Louisiana, in and for the Parish of Orleans, and this Honorable Court, as a Court of Equity of the United States, has no jurisdiction to hear, try or determine any of the issues set up in the said bill of complaint.

"Third. That the said bill is without equity, because it appears on the face of the will annexed to said bill that the legacy to the Charity Hospital, the St. Anna's Asylum, the Protestant Episcopal Asylum, the Home for Incurables, the Home for Insane and the Christian Woman's Exchange is a conjoint universal legacy, and, if the legacies to the Home for Insane have lapsed, as averred, the same belong to the other conjoint universal legatees.

"Wherefore, defendants pray that this demurrer may be sustained and the said bill be dismissed with costs."

After hearing, the Court below sustained the second ground of demurrer. From the final decree, dismissing the suit for want of jurisdiction, as appears from the order on the motion for appeal, and also from the certificate to this Court, an appeal was taken and is now prosecuted under Sec. 5 of the Act of March 3, 1891.

ASSIGNMENT OF ERRORS.

"Comes now Frances E. Waterman, wife of Charles A. Crane, by her counsel, and respectfully represents that she feels aggrieved by the final decree of the Court in the above entitled and numbered cause, and assigns error thereto, as follows:

"First. The Court erred in holding that the said Circuit Court was without jurisdiction over this cause.

"Second. The Court erred in sustaining defend-

ants' demurrer and dismissing Complainant's bill of complaint for want of jurisdiction.

"Third. The Court erred in holding that the United States Circuit Court had no jurisdiction to entertain the bill herein whilst the succession of Mrs. Caroline Stannard Tilton is still pending in the Civil District Court for the Parish of Orleans, State of Louisiana.

"Fourth. The Court erred in failing and refusing to overrule the defendants' demurrer."

ARGUMENT.

The several assignments of error may be considered as one.

And first, as to the jurisdiction of the appeal.

Section 5 of the Act of March, 1891, provides for direct appeal from and writs of error to the Circuit Court in any case in which the jurisdiction of the Court is *in issue*. The distinct issue of jurisidction presented by the second ground of demurrer, which alone was sustained, is "that the matter and things set forth in the bill are of probate cognizance. * * * and that this Honorable Court, as a Court of Equity of the United States has no jurisdiction, etc." That objection goes straight to the *want of power* in the Federal Court, as such, upon which the question of probate or no probate first requires determination. Confessedly, if "the matters and things set forth in the bill are of probate cognizance," then the Circuit Court was without power, as a Federal Court, to exercise jurisdiction over the bill; if not, then it has, provided the requisites as to the amount and citizenship exist. That this is so, and that the want of power was the only issue, the only one that could be logically considered or decided, is disclosed not only by the demurrer, which specifically

challenges the jurisdiction of the Court as a Court "*of the United States*," but by the decision of the learned Judge when he holds: "If this Court had jurisdiction *at all* the suit would have been properly brought on the equity side of the Court." (R., p. 29.) It is, therefore, clear that the exercise of jurisdiction was not, and could not be, reached without overruling the demurrer. In other words, by sustaining the demurrer, the probate character of the proceeding was necessarily asserted, upon which the want of power could alone be founded. From these premises, it follows just what the demurrer next sets up—the exclusive jurisdiction of the State Court. But that statement or conclusion does not enlarge or vary the sole issue of jurisdiction raised by the demurrer over the bill. Nor are we concerned with the reasons which influenced the lower Judge in maintaining this ground of demurrer, since the Act of 1891 does not extend to the reasons for or against, but to the *issue* of jurisdiction. His reasons may be good or they may be bad, or as we contend, they have no reference to or connection with the case in hand. Yet, the question of a want of power remains. This is expressed in the certificate and in case of inconsistency, the demurrer and the certificate should govern. Scully vs. Bird, 209 U. S. 481, 485. Therefore, the only issue that could be determined adversely to Complainant was, because the bill concerned matters of probate, there was *no grant*, under the judiciary acts organizing the inferior Federal Courts, over the subject.

It will next be conceded that probate jurisdiction—such, for instance, as the establishing of wills and granting letters testamentary and of administration—is neither included in nor excepted out of the judicial power of the

United States conferred by the Constitution. Gaines vs. Fuentes, 92 U. S. 10; Ellis vs. Davis, 109 U. S. 480. Also, that whilst Congress, in establishing inferior Federal Courts, may have the power, in legislating on the subject, to give to those Courts probate jurisdiction, it has not as yet seen fit to do so (Gaines vs. Fuentes, 92 U. S. 10; Ellis vs. Davis, 109 U. S. 480), and as there is an absence of probate jurisdiction in the grant of power by Congress conferring jurisdiction upon these Courts, when the issue of jurisdiction is based upon a matter alleged to be probate in character, the question of power alone, and not of its exercise, is manifestly brought into play. So, when a demurrer seeks a denial of jurisdiction by setting up that the matters and things set forth in the bill are of probate cognizance, the want of power in the Circuit Court as a Federal Court, and not of its exercise, is directly and necessarily involved. To sustain such a demurrer is to assert want of power in the Court as a Federal Court.

The other ground of demurrer goes to the jurisdiction of the Court as a Court of Equity. That admits the power, but denies its exercise. This ground of demurrer was *subordinate* to the other, and was not, and could not be, reached or decided, in view of the issue of a want of power of the Court as a Federal tribunal. It is for this reason that the lower Judge remarked: "If this Court has jurisdiction *at all* the suit would have been properly brought on the equity side of the Court." Indeed, it is not seriously contended that the bill does not come within the principles of equity, involving, as it does, the construction of a will, charities, trusts and the prevention of a multiplicity of suits.

Is the subject-matter of the bill included in the judiciary grant by Congress, and, if it is, have the Federal Courts original jurisdiction to establish a claim or right against and into an estate where the parties are, on one side, a citizen of Illinois, and on the other citizens of Louisiana?

It will be preliminarily noticed that, if the Succession of Mrs. Tilton is under administration (a fact which neither appears in the bill nor demurrer), it had progressed to such a stage as to be ready for final distribution among the legatees. Indeed, it is charged, in the fourth article of the bill, that certain legatees have already received their legacies, and by the ninth and tenth articles of the bill, Complainant specifically claims a lapsed legacy of $3,000, as also her proportionate share in the residue, amounting to $90,000, "after payment of the special legacies, charges and costs of administration." The residue of the estate is stated to amount to $350,000, and that Complainant's share in such residue will be increased upon the determination of the issue in her favor as against the Christian Woman's Exchange, one of the defendants, who is alleged not to be entitled to participate therein.

Is the jurisdiction of the State Court over Mrs. Tilton's succession so exclusive as to destroy Complainant's right to try her case and establish her claim under the Constitution of the United States and the laws of Congress extending the judicial power of the United States? It is settled law that any creditor, heir or legatee who is a citizen of another State has the right to institute his suit in the Federal Court against Executors and Administrators and all other parties interested, who are citizens of the same State as decedent, to determine the validity and extent of his rights and claims in the property of the

estate; nor is he deprived of his original right to maintain and to try his suit in the Federal Court by his failure to present his claim to the State Court as provided by the Administration Statutes of the State. Here are a few of the authorities: Suydam vs. Broadnax, 14 Pet. 67; Bank vs. Vaiden, 18 How. 503; Borer vs. Chapman, 119 U. S. 587, 588, 589; Payne vs. Hook, 7 Wall. 425, 430; Lawrence vs. Neilson, 143 U. S. 215, 224; Hays vs. Pratt, 147 U. S. 557, 570; Hess vs. Reynolds, 113 U. S. 73; Hyde vs. Stone, 20 How. 170; Byers vs. McAuley, 149 U. S. 608; Yonley vs. Lavender, 88 U. S. 276; Kendall vs. Creighton, 23 How. 90.

In the foregoing cases, the objection made that suits like the present could not be maintained, because the statutes of the State gave to its Probate Courts exclusive jurisdiction over all disputes concerning the duties and accounts of Executors and Administrators, was dismissed, and this Court maintained the bills, determined the rights of the distributees and declared that no legislation of a State could oust the jurisdiction of the Federal Court. After referring to this rule, declared in Payne vs. Hook, supra, the Court, in Borer vs. Chapman, 113 U. S. 587, said:

> "The only qualification in the application of the principle is, that the Courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of the State."

And in Byers vs. McAuley, supra, it was held:

> "A citizen of another State may establish a debt against the estate. Yonley vs. Lavender, 88 U. S.; 21 Wall. 276; Hess vs. Reynolds, 113 U. S. 73. But

the debt thus established must take its place and share of the estate as administered by the Probate Court; and it cannot be enforced by process directly against the property of the decedent. Yonley vs. Lavender, supra. In like manner, a distributee, citizen of another State, may establish his right to a share in the estate, and enforce such adjudication against the Administrator personally, or his sureties (Payne vs. Hook, 74 U. S.; 7 Wall. 425); or against any other parties subject to liability (Borer vs. Chapman, 119 U. S. 587), *or in any other way* which does not disturb the possession of the property by the State Court. (See the many cases heretofore cited.)"

It is claimed that the State Court, having acquired jurisdiction over the succession, is alone competent to entertain and determine every issue which may arise in the progress of the cause, whether it be as to the construction of the will, the rights of heirs and legatees to the estate, and the claims of creditors which may be asserted against it, whether such parties be citizens of other States or not, until the administration is terminated the funds distributed and the Executor discharged. Until that event occurs, no Federal Court is competent to grant any relief, whatever to a citizen of another State, who is not a party to the administration proceedings, and cannot be in any way concluded thereby. Thus, the judicial power of the United States conferred by the Constitution over "*controversies* between citizens of different States" is to be denied, and such citizens forced into the State Courts in order to have their complaints heard.

We perfer to make answer in the language of Mr. Justice Miller in Buck vs. Colbath, 70 U. S. 334, 347, wherein he says:

"Seizing upon some remarks in the opinion of the

Court in the case of Freeman vs. Howe, 24 How. 450 65 U. S. XVI, 749), not necessary to the decision of that case, to the effect that the Court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause, and that the Federal Court could not permit the State Court to withdraw from the former the decision of such issues, the counsel for plaintiff in error insists that the present case comes within the principle of those remarks.

"It is scarcely necessary to observe that the rule thus announced is one which has often been held by this and other Courts, and which is essential to the correct administration of justice in all countries where there is more than one Court having jurisdiction of the same matters. At the same time it is to be remarked that it is confined in its operation to the *parties before the Court*, or who may, if they wish to do so, come before the Court and have a hearing on the issue so to be decided. This limitation was manifestly in the mind of the Court in the case referred to, for the learned Judge who delivered the opinion goes on to show that persons interested in the possession of the property in the custody of the Court may, by petition, make themselves so far parties to the proceedings as to have their interests protected, although the persons representing adverse interests in such case do not possess the qualification of citizenship necessary to enable them to sue each other in the Federal Courts. * * * But it is not true that a Court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other Courts from the right to adjudicate upon other matters having a close connection with those before the first Court, and, in some instances, requiring the decision of the same questions exactly. * * * *

"*The limitation of the rule must be much stronger*

and must be applicable under many more varying circumstances, when persons not parties to the first proceeding are prosecuting their own separate interests in other Courts."

The principle announced in Buck vs. Colbath, supra, was again applied in Watson vs. Jones, 80 U. S. 679.

Nothing in this bill or in the demurrer suggests that there is pending in the State Court any controversy between Complainant and defendants. No claim has been asserted, no relief prayed for there, which could possibly form the basis of res adjudicata. No proceeding or judgment in the State Court looking to the construction of the will or the determination of Complainant's rights could bind her as long as she has not voluntarily appeared or been made a party thereto, all of which brings this case within the limitations above referred to. Hess vs. Reynolds, 113 U. S., supra.

It is next said that Federal jurisdiction is excluded because the purpose of the bill is to remove from the State Court the possession of the property of the succession in the hands of its officer, the Executor, and transfer it to the Circuit Court, under the principle that where property is in the actual possession of one Court of competent jurisdiction such possession cannot be disturbed by process out of another Court. A full statement of this rule and the authorities may be found in Moran vs. Sturges, 154 U. S. 256, 274, 275, but it receives this qualification, in the language of Mr. Justice Mathews, in Covill vs. Heyman, 111 U. S. 176, and approved in Byers vs. McAuley, supra:

"But that all other remedies to which he (a party) may be entitled, against officers or parties, not in-

volving the withdrawal of the property or its proceeds from the custody of the officer or the jurisdiction of the Court, he may pursue in any tribunal, State or Federal, having jurisdiction over the parties and the subject-matter."

Viewed from its four corners, this bill has no such object, and makes no such claim. How could a determination by the Federal Court, sitting in equity, as to the construction of the will or the trusts arising thereunder, or whether or not, as between the parties, Complainant is entitled specifically to the lapsed legacy of $3,000 and $90,000 of the residue of the estate, have the effect of withdrawing the succession funds from the State Court? No injunction is prayed for, restraining the Executor or any of the defendants from holding the property or from going ahead with the final distribution in the State Court if they choose, and no other preliminary decree, conservatory process or order in execution has been or is asked to be issued out of the Federal Court looking to the possession or control of the property.

What was said in Byers vs. McAuley, supra (p. 617), in analyzing the decision of Payne vs. Hook, 74 U. S. 425, has peculiar application;

> "In the opinion, on page 431, it is said: 'The bill under review has this object, and nothing more: It seeks to compel the defendant, Hook, to account and pay over to Mrs. Payne her rightful share in the estate of her brother, and, in case he should not do it, to fix the liability of his sureties on his bond.' There was no suggestion in the bill that the Federal Court take possession of the estate and remove it from the custody of the administrator appointed by the State Court; no attempt to settle the claims of

citizens of the State, as between themselves; no attempt to take the administration of the estate, *but simply to establish and enforce, in behalf of a citizen of another State, her claim to a share of the estate.*"

Incidentally, an accounting is asked for, but that is in support of the tenth article of the bill, wherein it is stated that, "after payment of the special legacies, charges and costs of the administration, the residue of said estate will amount to more than $350,000. * * * And so it would appear if the said Executor would set forth a full, true and particular account," etc. (R., p. 5), "and that the pretenses and claims of said defendants (meaning the charitable institutions) absolutely debars them, and each of them, under the ferms, conditions and penal clauses of said will from sharing in such residue, whereupon the pro rata share coming to said charitable institutions, and each of them, would devolve upon your oratrix," etc. (R., p. 6.)

The demurrer admits these facts, admits that, after payment of all special legacies and debts, the amount for final distribution among defendants and Complainant will be $350,000, and in case any of these institutions defendant should seek to contest any disposition of the will, the bequest to either of them would devolve upon Complainant. There is no plea here that the debts and special legacies have not been satisfied, upon which issue could be taken, but, on the contrary, the bill alleges and the demurrer concedes that the executor "possessed itself of the personal estate of the Testatrix more than sufficient to discharge her just debts, funeral expenses and legacies" (Rp. 2) and that certain legatees have already received their special legacies, presumably because the debts have

either been paid or their payment secured, or because there are none. So, that part of the bill is brought squarely within the language of Mr. Justice Brewer, in Byers vs. McAuley, 149 U. S. 620:

> "The State Court had proceeded so far as the administration of the estate carries it forward to the time when distribution may be had. In other words, the debts of the estate had been paid, and the estate was ready for distribution, but no adjudication had been made as to the distributees, and in that exigency the Circuit Court might entertain jurisdiction in favor of all citizens of other States, to determine and award their shares in the estate."

This case is much stronger than the one last cited, since generally, and under the Louisiana law, the debts must be first paid, and here a partial distribution has been had among certain special legatees, leaving for adjudication the sole question of the heir's right to take a special legacy that has lapsed and to participate in the residue. It will, however, be observed that in Byers vs. McAuley, supra, the want of jurisdiction in the Circuit Court was set up by plea, and the jurisdiction was sustained after issue was had on the plea, but, as this Court held, that whilst the Circuit Court had jurisdiction to construe the will and to adjudicate upon the rights and to award the shares in the estate of those parties who were citizens of States other than Pennsylvania, such jurisdiction had been exceeded by the final decree, which went further and adjudicated upon the rights of citizens of the same State (Pennsylvania) *inter sese*, and, by ordering a general distribution of the entire assets, the Circuit Court had thereby gathered unto itself the full possession and control

of the estate in the Orphans' Court. Accordingly, the decree was modified by conforming to the jurisdiction in remanding the case, "with instructions to enter a decree in favor of those citizens of other States than Pennsylvania, who have petitioned the Circuit Court for relief, and who are first cousins of the decedent, for their shares of the estate other than the real estate described in the declaration of trust, the amount of such shares being determined by the fact that the first cousins only inherit; and an order that they recover from the Administrator such sums thus found to be due." Byers vs. McAuley, 149 U. S. 624.

It will not be presumed that there are debts due by the estate, or that such debts have not been paid, or that the estate is not ready for final distribution. An account similar to the one filed by the Administrator in Byers vs. McAuley may, and no doubt will, be presented to the Federal Court on the trial, and the course followed in that case will no doubt be adopted in this one. The account is prayed for in order to show the residue in the hands of the Executor, so that such residue may be applied to Complainant's claim "in due course of administration, and that, for these purposes, proper directions be given." Here, by the very terms of the prayer, the claim which Complainant seeks to establish "must take its place and share of the estate as administered by the State Court," and hence it is not asked that "it be enforced by process directly against the property of the decedent." Byers vs. McAuley, 149 U. S. 620.

But the Court may deny relief for an accounting and still, under the prayer for general relief, grant the other, or any relief consistent with the allegations of the bill.

This is elementary. As was said in Watson vs. Jones, 80 U. S., supra:

> "Under this prayer for general relief, if there was any decree which the Circuit Court could render for the protection of the right of the plaintiffs, and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the Marshal of the Louisville Chancery, that Court had a right to hear the case and grant that relief."

All the foregoing contentions, we submit, have no connection with or application to the case in hand for the purpose of asserting a want of power in the Court as a Court of the United States to entertain "a suit against the administrator," which was fully recognized in Byers vs. McAuley and other cases cited. That there is no original jurisdiction conferred by the judiciary acts upon the Federal Courts, respecting the administration of a decedent, whether by a proceeding to probate a will as a preliminary step to the administration of a testate succession, or any other initial proceeding for the administration of an estate in an intestate succession is admitted, not only because it is *in rem* and in which all the world are parties, but being *ex parte,* it does not come within the designation of a suit at law or in equity, wherein there is originally a controversy between citizens of different states. (Gaines vs. Fuentes, 92 U. S. p. 10; Ellis vs. Davis, 109 U. S. 485).

In this case no original jurisdiction of the Circuit Court over the estate of a deceased person is claimed, since the bill alleges and the demurrer admits that the will was duly proved "in the proper Court." (R. p. 2). Nor can it be said, by entertaining jurisdiction of this suit against the

Executor and the other parties in interest, the Federal Court has either taken possession of the estate or the power of determining all claims against or to it, for no demand is made in the bill either by or against the defendants or others not parties with respect to their rights as between themselves. (Hook vs. Payne, 14 Wall 253).

Farrell vs. O'Brien, 199 U. S. 89, is claimed to be decisive against the Federal jurisdiction over this bill. In that case the only question was as to the power of the Circuit Court to annul a will admitted to probate. It was held that, where the laws of a State afforded a remedy by contest in proceedings supplementary to the original probate proceedings, such a contest was not inter partes, and hence not within the designation of "a suit at law or in equity." It was further held that, where the construction and effect of the will is wholly subordinate to the sole issue of probate, Federal jurisdiction did not attach under the rule "that no instrument can be effective as a will, no rights in relation to it can arise until preliminary probate has been first made." (Ellis vs. Davis, 109 U. S. 485.) But here there is no contest over the existence or non-existence of the will, and such a question is, therefore, a moot one. The will is admitted to be Mrs. Tilton's last will, and to have been duly proved "in the proper Court," and one of the defendants is recognized as Executor thereunder. That concludes any examination into the question whether there is a will or not, or whether one of the defendants is Executor or not, "*but it has no further operation*," as Lord Eldon, Chancellor, in Thornton vs. Curling, 8 Sim 310, is reported to have said.

We are thus saved from an extended review of Farrell vs. O'Brien, which is founded on an interpretation and

application of the statutes of Washington. These statutes are entirely dissimilar from the Louisiana probate proceedings and practice. In Louisiana, an action to set aside a will already admitted to probate is strictly and purely an independent action in nullity between parties. Unlike the Washington statutes, the judgment setting aside the will only binds the parties, inures only to the benefit of the particular contestant, and is *not* operative as to the whole world. This was specially recogniezd in Ellis vs. Davis, 109 U. S. 485, and Gaines vs. Fuentes, 92 U. S. 524. As to those not parties, the judgment of probate still stands prima facie valid. Thus, in Succession of Barker, 10 La. An., p. 28, it was held:

> "It cannot be urged by way of opposition to an Executor's account that the legacies are illegal—being disguised donations in trust for a concubine. Such an objection must be made the subject of a *separate* and *direct action against all the parties interested in maintaining the will*, or who are in possession derived by it."
>
> (See, also, Compton vs. Prescott, 12 Rob. [La.] 56.)

Of course, the modes of the action in nullity may be various, but essentially and in its nature it is one *inter partes*, and if the cause of nullity of a judgment probating a will is not one of form, but one of substance, relating to the merits, then the Courts of the United States have jurisdiction where diversity of citizenship exists. "State rules on the subject could not deprive them of it." (Barrow vs. Hunton, 99 U. S. 80-85; Arrowsmith vs. Gleason, 129 U. S. 86, 98; Johnson vs. Waters, 111 U. S. 640, 667.) It is, however, out of place to pursue this matter at length, since there is nothing in the case that seeks to set aside

the probate of Mrs. Tilton's will. The sole question is: Have the Federal Courts jurisdiction to establish a claim or right against and into an estate where the parties are, on one side, citizens of Illinois, and on the other citizens of Louisiana? The long line of jurisprudence of this Court remains unbroken. The question has been answered in the affirmative.

Respectfully submitted,

E. HOWARD M'CALEB,
E. HOWARD M'CALEB, JR.,
For Appellant.

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SEP 27

[illegible]

[illegible] THE UNITED STATES

[illegible]

[illegible]

THE CANAL-LOUISIANA BANK & TRUST CO.

[illegible]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

[illegible]

S. HOWARD McCALEB,

For Appellant.

[illegible]

SUPREME COURT OF THE UNITED STATES.

No. 638 October Term 1908.

MRS. FRANCES E. WATERMAN,

Wife of Charles A. Crane, Appellant.

vs

THE CANAL-LOUISIANA BANK & TRUST CO.,

Executor etc, et al.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

May It Please Your Honors:

In compliance with the request and order dated May 24th, 1909, to file briefs on or before the first day of the next Term, we herewith submit brief upon the question propounded: "Whether Frederick Tilton Davis, averred in the bill to be a resident of the State of Alabama and outside of the jurisdiction of the Court, is an indispensable party to the suit, and in his absence a dismissal of the cause required for want of jurisdiction in the court to proceed without him?"

Four independent causes of action are comprised in the bill. The first consists of the alleged infringement, by the Executor's and legatees' wrong, of complainant's single primary right as one of Mrs. Tilton's heirs for the recognition of her virile share separable from that of her coheirs. This is a distinct issue. The second, third and fourth, each, spring from Complainant's right of accretion resulting from the asserted renunciation of the succession by the separate act of each of her coheirs, the two Watermans and Davis. These last clearly constitute several issues.

Each proposition will be discussed in its order, and we propose to demonstrate the position of Davis as a dispensible party. We are constrained to do so, under the suggestion pointed out by Story in his work on Equity Pleading (10th Edition) Sec. 76, p. 89.

I.

Are the Watermans and Davis indispensible parties to the controversy between Mrs. Crane, the Executor, the legatees and those claiming the legacy to Home for Insane to establish her hereditary right and virile share? This question assumes that Davis and the Watermans are still seized of their rights and have not renounced the Succession of Mrs. Tilton, for if they have, they being without interest, their presence in these proceedings would be unnecessary and the Circuit Court undoubtedly has jurisdiction.

That the right of action for the establishment of her claim, *as well as her interests*, is separable from that of her coheirs has been firmly established by Louisiana jurisprudence. Thus, in Tugwell vs Tugwell 32 La. Annual p. 848, it was held that an heir may sue for his share of

a succession without making his coheirs parties, nor is it necessary that his heirship be decreed by a Probate Court before the institution of a suit for the recognition of his rights. See also Durbridge vs Crawley 43 La. Annual 504, 507. Again referring to and affirming the Tugwell case supra, in Glasscock vs Clark 33 La. Annual 584, 586, it was said: "We also there held, that an heir can sue for his share in a Succession without being constrained to make his coheirs parties." In Heirs of Burney vs Ludeling et al. 41 La. Annual, 627, 632, it was again said "of the objection that the two plaintiffs cannot sue for an undivided two-fifths interest in the property without citing their coheirs. This proposition is not supported by authority." Citing 33 La. AN. 586; 5 La. Rep. 430; 4 O.S. 472; 3 La. Rep. 134; 2 La. Rep. 300. (See also, Duggan vs. Di Lizardi 5 Rob. 224.)

In Denegre vs. Denegre 33 La. An. 689, "A suit brought against a Succession by the widow of one of the heirs, claiming the usufruct of her deceased husband's share of the estate, is not a real action or one of revendication and can be brought against the Executor alone without making the heirs parties to it.". See also Skipwith vs Glathary 34 La. Ann. 28. Articles 113 and 120 Code of Practice of Louisiana.

If this case was cognizable on the law side, the State jurisprudence as to parties would undoubtedly control. It certainly cannot be that federal jurisdiction, founded on diversity of citizenship, exists on the law side and does not exist on the equity side: for remember, the question propounded concerns the jurisdiction of the Circuit Court as a federal court. Whilst that is the formal question, the real question is one not of federal but of general equity jurisdiction. (Elmendorf vs. Taylor 10 Wheat. 167, 168; Mallow vs Hinde, 12 Wheat. 197, 198).

We do not say that Louisiana jurisprudence can be invoked to control the jurisdiction of the federal court, sitting in equity, nevertheless it should control the question upon which equity jurisdiction as to parties is founded concerning the character of an heir's interest in the estate as *separate* from that of his coheir. At least, it is persuasive, since it fully accords with equity jurisdiction as to parties and the decision in Payne Vs Hook 7 Wall. 425, 433. Thus in Story's Equity Pleading (10th Edition) page 94 Sec. 89, in stating cases illustrating the general doctrine as to parties to bills with the accompanying qualifications, it is laid down:

> "The same doctrine may be illustrated by the case of a bill brought by one of several residuary legatees, or by one of several of the next of kin, for a final settlement and distribution of the estate of a deceased testator or intestate. In general, in such a case, all the other residuary legatees or distributees, ought to be made parties, so that the rights and claims of all may be conveniently established at the same time and in the same suit. But if any residuary legatees or distributees are out of the jurisdiction of the Court, and cannot conveniently be made parties, either as plaintiffs or as defendants, the court will dispense with them, and proceed to decree the shares of the parties before it. Such a decree is of course not conclusive upon the absentees, or rather persons not made parties. But the general rule is dispensed with, because otherwise persons having clear rights would without their own default be precluded from asserting them, even when the rights of others would not necessarily be prejudiced thereby."
>
> Story Eq. Pl. Sec. 89, p. 94.

And again at Sec. 212 it is said:

"There are however certain qualifications of the general rule some of which have been already incidentally noticed, either standing on distinct principles, consistent with the rule itself or admitted as just exceptions to it. In the first place, if there is a certain and fixed trust fund, and each *cestui que trust* has a certain aliquot part in it, distinct from the others *so that there is no common interest in the object of the bill,* the others need not (as we have seen) be made parties."

Story Eq. Pl. Sec. 212 page 210 (10th edition)

See also Story Eq. Pl. Sec. 207a. page 205 (10th edition)

In Payne vs Hook 7 Wall. 425, 433. it was held:

"But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience will yield, when ever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit. Cooper Eq. Pl. 35.

The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever. West vs Randell 2 Mas. 181; Story Eq. Pl. Sec 89, et seq.

The present case affords an ample illustration of this necessity. The complainant sues as one of the next of kin, and names the other distributees, who have the same common interest without stating of what particular state they are citizens. It is fair to presume, in the absence of any averments to the contrary, that they are citizens of Missouri. If so, they could not be joined as plaintiffs, for that would take away the jurisdiction of the court; and why make them defendants, when the controversy is not with them, but with the administrator and his sureties. It can never be indispensible to make defendants of those against whom nothing is alleged and from whom no relief is asked. A court of equity adapts its decrees to the necessities of each case, and should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation. West vs Randall, supra; Wood vs Dummer 3 Mas. 317; Story Eq. Pl. supra."

In Minnesota vs Northern Securities Co. 184 U. S. 199, 235, 236, the classification of parties in equity suits is reiterated together with a resumé of the authorities, and it is therefore needless to cite any about which this Court is familiar.

By no stretch of reasoning can it be claimed that either the Watermans or Davis are indispensible parties to the main and independent cause of action. They may have a similarity but no community of interest with complainant in the controversy between her and the principal defendants. As Lord Redesdale said in his qualification of the

rule which he laid down (Red. Pl. 170). "In many cases the expression that all persons interested in the subject must be parties to the suit, is not to be understood as extending to all persons who may be *consequentially* interested." They are therefore formal parties and may be dispensed with. But even should it be determined that they may incidentally have an interest in the controversy between the immediate litigants, such interest is so separable, that a decree may be entered without injuriously affecting their interests, and under the jurisprudence of this court, its legislative recognition evidenced by the Act of Congress of February 28th 1839 (5 Stat. at L. 321, Chap. 36) and the 47th Equity Rule, they may, at most, be termed necessary-dispensible parties.

There is no suggestion in the bill that they are contesting the right of Mrs. Crane to claim her virile share. Nor do they claim any beneficial interest therein. As was intimated in Payne vs Hook 7 Wall. supra, the Watermans, citizens of Louisiana, could not be joined as plaintiffs, for that would take away the jurisdiction of the court, and why make them defendants, for on this branch of the case the controversy as to Mrs. Crane's share, is not with them but with the executor, the defendant legatees and those claiming the legacy to the Home for Insane? Whilst the joining of Davis as a party plaintiff would not take away the jurisdiction of the court, still his interests are so separable from that of the other parties, he could not be prejudiced either by joining him as a plaintiff or dispensing with him as a defendant. He could not be joined as plaintiff, because the bill alleges that he has disclaimed or renounced, and his renunciation is equivalent to a refusal to come in as plaintiff, besides, were he so joined the bill would be otherwise demurrable for inconsistent equities resulting from his receipt given the executor. This point has been considered by this court

in Omaha Hotel Co. vs Wade 97 U. S. (7 Otto) 13-24, where both trustee and certain bondholders were not joined as plaintiffs in a foreclosure suit. It was there said:

> "Holders of such securities otherwise entitled to sue in the circuit court to foreclose the mortgage or trust deed are not compelled to join as respondents other holders of similar securities, if resident in other states, even if they refuse to unite as complainants, as the effect would be to oust the jurisdiction of the court. Cases of the kind frequently arise; and the rule is that such a party, if he refuses to unite with the complainant, may be omitted as a respondent, unless it appears that his rights would be prejudicially affected by the decree. But it is suggested that the proper parties for a decree are not before the court, as the bill of complaint shows that there are other holders of the securities besides the complainants.
>
> It is true, beyond doubt that all persons materially interested in the fund to be distributed should be made parties to the litigation; but this rule, like all general rules, will yield whenever it becomes necessary that it should be modified in order to accomplish the ends of justice. Authorities everywhere agree that exceptions exist to the general rule; and this court decided that the general rule will yield if the court is able to proceed to a decree, and do justice to others not made parties, who are equally interested in the litigation. Payne vs Hook 7 Wall. 425."

And in Van Bokkelen vs Cook, Fed. Cas. 16.831 before Circuit Justice Field, and Judges Sawyer and Hillyer,

which was a bill to recover assets fraudently withheld by an administrator and where, though no final settlement had been made by the administrator with the probate court, it was held that the complainant was not bound to resort to the probate court to correct the errors in the accounts of the administrator. It appeared that one of the heirs had not been made a party. It was said:

> "In regard to the non-joinder of Minnie Von Bokkelen there is this to be said. She appears from the bill to be an heir and distributee. She is therefore a proper party, but upon the authority of Payne vs Hook 7 Wall. 425, she is not an indispensible party. If, as was said in that case, the court is able to proceed to a decree, and do justice to the parties before it without injury to absent persons, it will do so. The real object of the present suit is the collection of assets of the estate of the deceased Van Bokkelen, alleged to have been wrongfully appropriated by the defendants to their use. The suit can proceed for this purpose, without any injury to the rights of absent heirs. If assets are recovered all entitled to share in them may be allowed to come in for that purpose, or their rights can be fully protected by the decree."

See also Elmendorf vs. Taylor, 10 Wheat. 167, 168.

II.

What has just been remarked is equally applicable to the three last causes of action which severally originate in complainant's right derived by operation of law from the separate act of each one of her coheirs. Should it be decreed that neither of the Watermans have renounced, complainant's share would be one fourth; if one of them and not the other, one third; if both of them, one half.

Whilst it is alleged that Davis has renounced, such allegation is a conclusion drawn from the fact that he received his particular legacy which deprived him of any right of contest or claim, but had the bill directly stated the fact without drawing the conclusion, that would have put an end to the question propounded. And yet, no decree as to his renunciation is prayed for, but on the contrary by the second subdivision of the prayer he is industriously excluded. However, the difficulty which we believe has arisen in your Honors' minds, lies in the third subdivision of the prayer, wherein complainant asks that she be decreed entitled to the whole of the lapsed legacy and the proportionate share which would have come to the non-existent Home for Insane in the residue of the estate.

We concede, that whilst Davis would not be bound by a decree recognizing complainant to be entitled to the whole residue of the estate and he might in the event of complainant's success assert a demand against the principal defendants which would be inequitable after the latter's performance of a decree in complainant's favor, yet if that probability could be obviated either by an amendment, a supplemental bill or an original bill in the nature of a supplemental bill to meet it, the court will so order under the prayer for general relief. This power or discretion in a court of equity has been frequently and liberally exercised and authorities need not be cited to sustain it.

As previously observed, by the Louisiana law, the right of an heir to his virile share is distinct and separate from that of his coheir—*tot partes quot viri.* Each is entitled to the whole of a distinct moiety and *not per nihil et per totum* to the whole jointly, and each distinct moiety is descendible to his heirs by representation or otherwise,

or may be conveyed or renounced without leave of his coheirs. (See Louisiana Civil Code Book III Title I Of Successions). *And as the liability and obligations of each heir is several and not joint* (La. Code of Practice Art. 120) *so also is the right and interest.* La. Code of Practice Art. 113). (Duggan vs. di Lizardi 5 Robinson (La) Report 224).

The reason for joining the two main causes of actions and the parties thereto, lies in the aim of a court of equity to take away a multiplicity of suits and prevent future litigation. But if the interest of a party who could not be joined (because his citizenship would defeat the jurisdiction) is so separable as not to be affected by any decree between the other parties, he may be omitted and the cause proceeded with against the rest. This is provided by the Act of 1839 and the 47th Rule. Starting out, therefore, with the premise, that each of the several rights and interests of the parties stand upon its own independent basis, it is plain that if the bill and prayer for relief can be so amended or a decree entered as not to affect Davis and thereby permit the court to retain jurisdiction over the other parties, he may be dispensed with either (a) by an allegation supported by Davis' express disclaimer or renunciation, or (b) by plaintiff expressly waiving any and all claims against him, or (c) by a reservation of his rights to be advanced in a proper proceeding. Payne vs. Hook 7 Wall 425, 431; Hook vs. Payne 14 Wall 252. Any one of these would amply protect the principal defendants in the performance of the decree. At all events, under the prayer for general relief, any decree rendered without prejudice as to Davis would protect them, such decree to conform to the equities of the case.

(a) It can never be indispensible to make one a party

who disclaims interest in the subject matter or the suit by an express renunciation of his rights. In the stating part of the bill it is averred that Davis had received his special legacy and under the penal clause of the will he was thereby estopped from asserting any interest or right in the intestate succession of Mrs. Tilton. This is equivalent to saying that Davis had tacitly renounced, and by operation of law his share fell to complainant. (Revised Civil Code of La. Arts. 1015, 988, 976 to 1031 inclusive; 940, 976, 1709). Nothing is demanded from him, but on the one hand, as complainant claims the entire residue from the principal defendants, when you come to a decree, this would be tantamount to declaring his renunciation without giving him an opportunity to be heard. That does not follow however, since the court could shape its decree without prejudice as to him and thus afford protection to the other parties. On the other hand, an express disclaimer of interest under proper instrument by Davis, coupled with a supplemental bill to take testimony *de bene esse* or some other appropriate proceeding, would do substantial justice to the parties before the court. In Findlay vs. Hinde I Peters 241, on a bill filed by citizens of Kentucky against citizens of Ohio in the U. S. Circuit Court for the District of Ohio praying a discovery, conveyance of title and delivery of possession of land and an account of profits, it appeared that one Garrison, under whom all parties claimed, had made an executory contract with one of them respecting the premises which was insufficient to convey the legal title. This Court decided that Garrison was an indispensible party and as he had not been joined, remanded the case with instructions to permit complainants to amend their bill by making him a defendant. The bill was accordingly amended, and when the case came up on the amendment in Vattier vs. Hinde 7 Peters 252, Garrison, who was a citizen of Illinois, disclaimed all interest (p. 258). After

a review of the authorities, on pages 261 to 265, Chief Justice Marshall said:

> "In the case at bar, Abraham Garrison has no claim, legal or equitable, to the property in contest. No decree could be made against him, and he has filed his answer disclaiming all interest in the cause. It is true that his answer is not evidence as an answer, since the court has no jurisdiction as to him. But in a question concerning himself only; in a question whether the court will abstain from exercising its jurisdiction between parties, in some of whom the whole title in law and equity is vested, lest his interests should be affected; *his disclaimer of all interest,* appearing in the form in which it appears, *cannot be disregarded.*
>
> Had the *case on* the former hearing appeared as it now appears, had *it been then known* as it is now known, that making Garrison a party would turn the plaintiffs out of court, and that he disclaimed all interest in the cause; had these facts appeared in the former record, we think the decree would not have been reversed for the cause assigned for its reversal. We are therefore of opinion that the court committed no error in making their decree between the remaining parties, after the bill had been dismissed as to Abraham Garrison."

See also Delaware County vs. Diebold Safe Co. 133 U. S. 473.

(b) Complainant may be required to waive her allegations as to Davis and still the Court has jurisdiction. Thus in Northey vs. Northey 2 Atk. 77 (26 Eng. Reprint 447) on a bill brought by a widow claiming her paraphernalia,

which the husband in his life-time took possession and who, by his will gave some to different persons as specified legacies and the rest he directed to be sold by his executor. It appeared that the specific legatees were infants and were not made parties. The Lord Chancellor said:

"It has been objected that the specific legatees are in-"fants and are not before the court; and I am of opinion "that the specific legatees ought to have been brought "before the court; and unless the plaintiff will waive the "part that was devised to them, the case must stand "over to make proper parties."

Again in Williams vs. Williams 9 Mod. 299 (88 Eng. Reprint p. 465, 466) Lord Hardwicke said: "Where the "plaintiff is only concerned in interest, then he may "waive such demand and omit making the party a de-"fendant to his bill."

(c) Reservation of Davis' rights need hardly be made by an amendment, though it may, if required. Nothing is demanded from him and nothing can be decreed against him. No one will presume that the Circuit Court will enter an inequitable decree against the principal defendants. It might occur at the hearing that the case against the two Watermans or either of them had not been made out. That would dismiss the bill as to them or either of them, and still Complainant would be entitled to a decree. For like reason, as we have dismissed Davis, because his presence would oust the jurisdiction, Complainant would still be entitled to a decree for her share as against the principal parties. Hook vs. Payne 14 Wall, supra; Byers vs. McAuley 149 U. S. 608. "A court of equity adapts its decrees to the necessities of the case" (Payne vs. Hook 7 Wall supra) and may so modify the relief prayed for

as to meet the dictates of equity and good conscience. This is elementary.

In Harding vs. Handy II Wheat. 103, 132, 133, Chief Justice Marshall maintained or rather directed a sale of the undivided interests of parceners in property, who were before the Court, and as to those parceners who could not be made parties, their vested equitable interests were reserved. He said: "If all the heirs cannot be brought before the court, the undivided shares of those who do appear, is to be sold, and the lien of Asa Handy is to remain on the part or parts unsold, to secure the payment of so much of the money due to him as those parts may be justly chargeable with." The decree reads: "the cause is remanded to the said Circuit Court with liberty to the plaintiffs to make all proper parties, that the whole may be sold if all the heirs can be male parties, otherwise the shares of such as are made parties."

Respectfully submitted

E. HOWARD McCALEB

For Appellant.

Office Supreme Court, U.
FILED.
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JAMES H. McKENNEY

306

No. 628 October Term 1908.

SUPREME COURT OF THE UNITED STATES.

MRS. FRANCES E. WATERMAN,
Wife of Charles A. Crane, Appellant.

vs

THE CANAL-LOUISIANA BANK & TRUST CO.,
Executor etc, et al.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Supplemental Brief for Appellant.

Since filing our brief on the question as to the indispensibility of Davis, opposing counsel have directed attention to Garzot vs Rios De Rubio 209 U. S. 283.

That was a bill filed by an heir for a settlement and partition of three successions and incidentally the liquidation of a dissolved matrimonial community; and as

ancillary thereto, the setting aside of a decree of the Porto Rico Probate Court affirming a private agreement respecting the settlement of two of these three successions which was likewise asked to be annulled. This Court, merely reaffirmed the well settled rule, that you cannot sue in equity to set aside the agreement or the decree of the Porto Rico Court without bringing in all the parties thereto or their heirs, which had not been done. In other words, as the interests of all in the contract and decree were inseparable, the obstacle was insuperable and the cause should stand over to make parties of those necessarily indispensible who were omited, agreeably to what was said in Shields vs Barrow 17 Howard 130:

> "A bill to rescind a contract affords an example of this kind. For if only a part of those interested in the contract are before the court, a decree of recission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensible parties."

But the bill in the Garzot vs. De Rubio case, supra, was not dismissed for want of jurisdiction as to parties, but for want of jurisdiction *over the subject matter*. Otherwise, the cause would have been remanded with leave to amend by bringing in the estate of Mrs. Gutman and her children by a second marriage. It was said:

> "While the considerations previously stated establish the impossibility of affirming, and the ne-

cessity for reversing and remanding, they also engender the inquiry whether in view of the nature and character of the relief sought by the bill, it is our duty to remand for a new trial, or with directions to dismiss the bill because of an inherent want of jurisdiction to give the relief which the bill sought.

Putting out of view for a moment the averments and prayer of the bill relating to the nullity of the private agreement, and the sales made of the property which was transferred by that agreement to the mother, we think it is patent on the face of the bill that it but invoked the authority of the court to exercise purely probate jurisdiction by administering and settling the estate of Rios, the estate of his son, and that of the mother, and as an incident thereof, to liquidate the community which had existed between Rios and his wife. Indeed, such was exactly the substantial relief which the bill as finally amended prayed." (See pages 301, 302.)

This Court further held (pages 304, 305) that as by the local law of Porto Rico, distinctions between law and equity, in a technical sense, do not obtain, and as the Porto Rico Court had both general and probate jurisdiction, it alone had power to set aside the agreement of settlement and its own decree in affirmation, as an incident to its probate jurisdiction.

Compare the Garzot—De Rubio case, supra, with Payne vs Hook 7 Wall. 425, and you will see that as the U. S. Circuit Court, sitting in equity, had jurisdiction to establish Mrs. Payne's claim to a share in the estate, as ancillary thereto, it had jurisdiction to set aside the settlement made between her and the administrator. No attempt was made to take the administration of the estate, or to settle the claims of citizens of the State as between themselves or to take the possession of the es-

tate out of the custody of the State Court. So also in Byers vs McAuley 149 U. S. 608 and a host of other decisions cited in our original brief. In the Garzot—De Rubio case, on the contrary, the jurisdiction of the federal court was sought to administer and wind up three successions and thus transfer to the federal court the administration and settlement of these three successions and the possession of the property already in the custody of the local court.

Under which of these two well-defined lines of federal jurisdiction does this case fall? Though federal equity jurisdiction is the same which the High Court of Chancery in England possessed and is subject neither to limitation nor restraint by state laws (Payne vs Hook 7 Wall 425) and though there are no designations of separate equity suits or suits for special relief in Louisiana, whilst undoubtedly there are essentially such suits, (Gaines vs Fuentes 92 U. S. 10); yet Louisiana jurisprudence recognizes the heir's right of action for special equitable relief to establish her claim. This bill is nothing more nor less than the *petitio hereditatis* of the Roman Law, by which the heir claims her hereditary estate as heir, that is to say, for the recognition of a right to her virile share of the estate or an aliquot part therein. (Tugwell vs Tugwell 32 La. An. 848). The bill in Garzot vs De Rubio had no such object. It proposed original probate jurisdiction of the federal court by seeking to open and close three successions and to partition the property among those entitled to it. The case here falls within the decisions which we have cited, both as to parties and subject matter. See also Ingersoll vs Coram 211 U. S. 335.

Respectfully submitted,
E. HOWARD McCALEB,
For Appellant.

Office Supreme Court, U. S.
FILED.
FEB 23 1909
JAMES H. McKENNEY,
CLERK

United States Supreme Court.

No. 306.

MRS. FRANCES E. WATERMAN, WIFE OF CHARLES A. CRANE,

VERSUS

CANAL-LOUISIANA BANK AND TRUST COMPANY, EXECUTOR OF MRS. C. S. TILTON ET ALS.

BRIEF FOR APPELLEES.

WM. C. DUFOUR,
EDGAR H. FARRAR,
JAS. McCONNELL,
CHAS. E. FENNER,
GEO. C. WALSH,
GEO. H. TERRIBERRY,
H. GARLAND DUPRE,
S. McC. LAWRASON,
WALTER GUION,
Attorney-General;
VICTOR LEOVY,
Solicitors for Appellees.

J. G. HAUSER, "The Legal Printer," 620-22 Poydras Street, N. O.

United States Supreme Court.

No. 638.

MRS. FRANCES E. WATERMAN, WIFE OF CHARLES A. CRANE,

VERSUS

CANAL-LOUISIANA BANK AND TRUST COMPANY, EXECUTOR OF MRS. C. S. TILTON ET ALS.

I.

(a) Mrs. Tilton, a wealthy lady of New Orleans, Louisiana, died, leaving a will in which she appointed the Canal-Louisiana Bank and Trust Company her executor, "*with full seizin*," of her succession.

The will was duly probated in the Civil District Court for the Parish of Orleans, and the executor was qualified and letters of executorship issued to it.

(b) After making over twenty special legacies to particularly-named persons, the will continued as follows:

> *"To the Charity Hospital of New Orleans.. $2,000*
> *To St. Anna's Asylum 2,000*
> *To the Protestant Episcopal Orphan Asylum, Jackson Ave., New Orleans.... 2,000*
> *To the Home for Incurables 2,000*
> *To the Home for Insane 3,000*
> *To the Christian Woman's Exchange 1,000*
>
> *"After satisfaction of all the foregoing special legacies and bequests, and after payment of all costs and expenses in settlement of my estate, if I have remaining any besides undisposed of, I will and direct that such residue shall be divided between the beneficiaries of the charitable bequests heretofore made to various institutions; the division to be made pro rata, and in proportion to the amount of the special legacies already made them respectively."*

(c) That is, Mrs. Tilton directed that what should remain of her estate, after paying special legacies, should go to the charitable institutions to which she made special legacies, and that these institutions were to take the residuum in proportion to their special legacies. It is not necessary for the determination of the question now before the Court to decide whether all six of the six last-named legatees were *charitable institutions,* or whether *only five* of them were. If all six were charitable institutions, then the *Home for Insane* would be entitled, apparently, to three-twelfths of the residuum.

If only five of them were of that character, then, apparently, the *Home for Insane* would get three-elevenths of the residuum.

(d) After the succession of Mrs. Tilton had been opened, the executor qualified, and the administration by the executor had been begun, Mrs. Crane, the plaintiff below and appellant here, filed her bill in this suit in the Federal Circuit Court for the Eastern District of Louisiana, claiming:

FIRST. That, by reason of facts stated in the bill, and in connection with and as a result of certain dispositions in the will, she is now *the only person who can claim as legal heir of Mrs. Tilton.*

SECOND. That the special legacy of $3,000 to the *Home for Insane* has LAPSED, because there was no such institution in existence.

THIRD. That plaintiff, as sole legal heir of the testatrix, is entitled not only to the special lapsed legacy, but also to the proportion of the residuum which would have gone to the *Home for Insane* if that legacy had not lapsed.

(e) The bill PRAYED:

FIRST. That the Court adjudge that the special legacy of $3,000, and the legacy of proportionate interest in the residuum to the *Home for Insane,* have lapsed.

SECOND. That, in consequence of certain provisions in the will, plaintiff's coheirs, under the law, be decreed to have *renounced or abandoned* their rights as legal heirs

of Mrs. Tilton, so as to leave plaintiff Mrs. Tilton's *sole legal heir,* and as such alone entitled to the alleged lapsed legacies.

THIRD. That the Christian Woman's Exchange be decreed *not a charitable institution,* and, therefore, not entitled to share in the residuum of the estate.

FOURTH:

> *"That an account be taken of the personal estate and effects of the said testatrix coming to the hands of the said executor, or of any person or persons by its order or for its use, and also of the said testatrix's funeral expenses, debts, legacies and costs of administration, and especially showing the residue in the hands of the said executor, after making the aforesaid deduction, and that the same may be applied in due course of administration, and that for these purposes proper directions may be given."*

(f) The defendants EXCEPTED on three grounds—viz.:

FIRST. That the Court had no jurisdiction of the case *as a court of equity.*

SECOND. That the suit was a probate matter and entirely within the jurisdiction of the Civil District Court for the Parish of Orleans, and that the lower Court was without jurisdiction.

THIRD. That the bill was *without equity,* because, even if the legacy to the *Home for Insane* had lapsed, the disposition in the will was a conjoint universal legacy, and the lapsed legacy would go to the other legatees.

The Court below overruled the first exception, sustained the second, and declined to pass on the third.

II.

The opinion of the Judge *a quo* gives a succinct statement of the reasons and authorities on which the defendants rely, and we reproduce it here in support of our position.

Opinion of the Court.

The bill avers in substance:

(1) That the complainant, Mrs. Frances E. Waterman Crane, is the sole legal heir of the late Mrs. Carsline Stannard Tilton.

(2) That Mrs. Tilton died on July 6, 1908, leaving a last will and testament, which has been probated in the proper court, and that the Canal-Louisiana Bank and Trust Company "duly proved the same in the proper Court, and undertook the executorship thereof, and possessed itself of the personal estate and effects of the said testatrix to a very considerable amount, and more than sufficient to discharge her just debts, funeral expenses and legacies."

(3) The bill further avers that the will left special legacies of stated sums of money: To the Charity Hospital, $2,000; to St. Anna's Asylum, $2,000; to Protestant Episcopal Orphan Asylum, $2,000; Home for Incurables, $2,000; Home for Insane, $3,000, and Christian Woman's Exchange, $1,000; and that the special bequest of $3,000 to the Home for Insane has lapsed, "as there was no such institution or corporation or person in ex-

istence, or known, as 'Home for Insane,' nor was the said testatrix capable of incorporating any institution as 'Home for Insane,' under her said will, nor did she attempt so to do by the provisions thereof, and there was and is no such institution known as 'Home for Insane.'"

(4) That the will contained this clause:

> "After satisfaction of all the foregoing special legacies and bequests, and after payment of all costs and expenses in settlement of my estate, if I have remaining any besides undisposed of, I will and direct that such residue shall be divided between the beneficiaries of the charitable bequests heretofore made to various institutions, the division to be made *pro rata*, and in proportion to the amount of the special legacies already made them respectively."

(5) The bill claims not only that the bequest to the Home for Insane has lapsed for uncertainty as to said legatee, but also that the Christian Woman's Exchange is not a charitable bequest, and that the Christian Woman's Exchange is not to be counted as one of the various institutions designated or intended by said testatrix which is to share in the charitable bequests of the residue.

(6) Accordingly the bill claims, in substance, that there are only five persons entitled to share in the residue of the estate—namely, herself, as sole legal heir, and the Charity Hospital, the St. Anna's Asylum, the Protestant Episcopal Orphan Asylum, and the Home for In-

curables. She claims that she is entitled to the lapsed legacy of $3,000, and to the proportion of the residue to which that $3,000 is entitled, after excluding the Christian Woman's Exchange from the residuary legatee.

It is averred that the residue exceeds $350,000, and that complainant is entitled to recover over $90,000 of this by virtue of her above-stated rights, and that the executor ought to be condemned to pay her this sum.

She avers that the executor refuses to pay her this sum, and she, therefore, brings this suit wherein she prays:

(1) That this Court decree that the particular legacy of $3,000 left by Mrs. Tilton to the Home for Insane has lapsed, because of the uncertainty and nonexistence of said legatee.

(2) That petitioner be decreed to be the sole legal heir of Mrs. Tilton.

(3) That as such sole legal heir she be decreed to be alone entitled to the said lapsed special legacy of $3,000 bequeathed to the said so-called "Home for Insane," and to the proportionate share in the residuum which the testatrix intended should go to said nonexisting and uncertain legatee. And that said executor be condemned to pay over and deliver to your oratrix the whole amount of said lapsed special legacy, "together with the proportionate share and interest to said so-called 'Home for Insane,' in the residue of the estate of said deceased remaining after the payment of the particular legacies and the costs of administration of her estate, and for such

further sum as the Court may find to be justly due and owing unto your oratrix as the legal heir and next of kin of the said Caroline Stannard Tilton."

(4) That it be further ordered and decreed that the Christian Woman's Exchange is not a charitable institution, or entitled as such under said will to participate or receive any share or portion of the residue of the estate of said deceased.

(5) That an account be taken of the personal estate and effects of the said deceased coming to the hands of said executor, or of any person or persons, by its order or for its use, and also of the said testatrix's funeral, debts, legacies and costs of administration, and especially showing the residue remaining in the hands of the said executor after making the aforesaid deduction, and that the same may be applied in due course of administration, and that, for these purposes, proper directions may be given.

A copy of the will is annexed to the bill as part thereof.

To this bill a demurrer was interposed, averring:

(1) That this Court, as a court of equity, is without jurisdiction of the matters set forth in the bill.

(2) That the matters and things set forth in said bill are of probate cognizance and entirely within the jurisdiction of the Civil District Court in and for the Parish of Orleans, and this Honorable Court, as a court of equity of the United States, has no jurisdiction to hear, try or determine any of the issues set up in said bill of complaint.

(3) That the bill is without equity, because it appears on the face of the will annexed to the said bill that the legacy to the Charity Hospital, the St. Anna's Asylum, the Protestant Episcopal Orphan Asylum, the Home for Incurables, the Home for Insane, and the Christian Woman's Exchange is a conjoint universal legacy, and, if the legacy to the Home for Insane has lapsed, as averred, the same applies to the other conjoint universal legatees.

The complaint alleges that she is now the sole legal heir of Mrs. Tilton, and she insists that, under her construction of the law, and of the terms of Mrs. Tilton's will, there is an undisposed interest in Mrs. Tilton's succession, to which she, complainant, is entitled as sole heir.

The executor of the will refuses, however, to recognize that complainant is entitled, under the law and under the terms of the will, to any part of Mrs. Tilton's estate. In this situation there is a controversy between complainant and the executor as to the proper construction of the will, and as to whether complainant has or has not any interest in the succession.

The succession has been opened in the proper State court, and is now being regularly administered therein. That Court, through its officer, a duly qualified executor, to whom the will gave "full seizin," has possession of all the property composing the succession. In the administration of the succession the State Court not only has jurisdiction to construe the will, but is under the necessity of doing so, in order to determine who are the special

legatees and who are the residuary legatees to whom the residuum of the estate shall be delivered after payment of the debts and special legacies. The State Court has also jurisdiction to determine who are the creditors of the succession, and to adjust the costs and expenses of the administration.

The complainant herein files this bill wherein she asserts against the executor and the other residuary legatees her claim of right in and to a part of the succession, and prays this Court, first, to decree that her alleged title is good and valid, and, second, to go on and determine the amount of the debts due by the succession, and to fix the costs and expenses of the administration, and to order an accounting and distribution. That is, she demands, not only that this Court shall determine, as between her and the executor and residuary legatees, the validity of her alleged title to a part of Mrs. Tilton's succession, but she also demands, in effect, that the entire administration of that succession shall be transferred from the State Court, in which it is now pending, into the Federal Court. The State Court is to be stripped of all power to do a single act of administration, and is simply to be relegated to the position of a stakeholder, and to be ordered and compelled to distribute the succession to such special legatees, residuary legatees and creditors as this Court shall find to be entitled. This is certainly a novel and extraordinary proceeding.

The jurisdiction of this Court is invoked solely on the ground of diversity of citizenship—the complainant be-

ing a citizen of Illinois, and the defendants citizens of Louisiana. It is not alleged that complainant is deprived of any right secured by Federal law. She seeks, in the Federal Court, the same substantive rights which would be accorded her in the State court. The sole question is which Court shall adjudicate upon her rights. It is not intimated that either Court would apply a different rule from that which would be applied in the other court.

Then, has the Circuit Court for the Eastern District of Louisiana any jurisdiction to entertain this bill, and to remove the administration of Mrs. Tilton's succession out of the Civil District Court for the Parish of Orleans, and itself administer that succession?

To ask the question is to answer it. No Federal Court has jurisdiction to remove an entire succession administration from a State Court, as the bill in this case proposes to do. The State Court acted first, and, under the law of Louisiana, has the entire estate in its possession and its administration, and it is entitled to proceed with that administration until it shall be completed. If complainant's contention is correct, then a nonresident creditor of an estate in the hands of a receiver appointed by a State Court could file a suit in a Federal court against the State court receiver, and request the Federal Court, not only to pass upon the litigated claim, but further to fix the costs and expenses of the State court receivership, to determine who were the creditors of the estate, to settle the amount for distribution and the rank and order

in which the creditors should be paid, and to direct the receiver to account to the Federal Court and not to the State Court.

No precedent for this remarkable action can be found. Counsel for complainant insist, however, that the decision in *Byers vs. McAuley,* 149 U. S. 608, is authority for this proceeding. But in the subsequent case of **Farrell vs. O'Brien, 199 U. S. 89,** the Supreme Court, at page 109, says of the decision in *Byers vs. McAuley:*

> "In *Byers vs. McAuley,* 149 U. S. 608, it was decided that a Federal Court cannot exercise original jurisdiction in respect to the administration of a decedent, and that it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it."

But, in the present case, the complainant is asking a Federal Court to do the precise things which the Supreme Court says the case of *Byers vs. McAuley* declared that no Federal Court could do. The prayer of the bill asks, among other things, that

> "an account be taken of the personal estate and effects of the said testatrix coming to the hands of the said executor, or of any person or persons by its order or for its use, and also of the said testatrix's funeral expenses, debts, legacies and costs of administration, and especially showing the residue remaining in the hands of said executor after making the aforesaid deduction, and that the same may be applied in due course of administration, and that, for these purposes, proper directions may be given."

Manifestly, the foregoing is an attempt to have a Federal Court determine all claims against or to the Succession of Mrs. Tilton, and this attempt is made in a suit against the executor, and on no other ground than the complainant has sued the executor. The cases cited above sufficiently show, in my opinion, that this Court is without jurisdiction to entertain the suit as propounded by the complainant.

In several cases decided by the Supreme Court of the United States, notably in *Lawrence vs. Nelson*, 143 U. S. 223, there are found statements to the effect that

> "the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different States, the assets of a deceased person within its jurisdiction, cannot be defeated or impaired by laws of a State undertaking to give exclusive jurisdiction to its own Courts."

And in *Hayes vs. Pratt*, 147 U. S. 570:

> "Certainly no such statutes can defeat or impair the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different States, the assets of a deceased person within its jurisdiction."

These cases seem to assert very broadly that the Circuit Courts of the United States have a power to administer, as between citizens of different States, assets of a decedent within the jurisdiction of the Court. Conceding that such power is vested in the Circuit Court of the United States, it will be admitted that the power to ad-

minister the assets of decedents is primarily vested in the State Courts and is usually exercised by those Courts.

These cases can hardly be taken to mean that the power of administration lodged in the Circuit Courts of the United States is so paramount in its nature that the Circuit Court of the United States, when called upon to exercise it, can take property from the State Courts which those Courts have certainly a concurrent power to administer, and which they are actually engaged in administering. This would be violative of the principles of comity which exist between the Federal and the State Courts, and would be in conflict with the well-settled rules that obtain in respect to the administration of estates generally, whether that administration is conducted by an executor, by an administrator, by a liquidator, or by a receiver. In any of these cases the Court which first obtains jurisdiction, and is proceeding in the regular exercise of that jurisdiction, has the unquestioned right to retain in its possession the property which it has begun to administer, free from any interference or control by other Courts.

I have examined the authorities cited in complainant's brief, and I do not find any of them pertinent to the issues raised in this case.

For the reason given—namely, on the second ground of the demurrer—the bill must be dismissed with costs. If this Court had jurisdiction at all, the suit would have been properly brought on the equity side of the Court. I express no opinion on the third ground of the demurrer.

III.

To the reasons given by the Judge *a quo* for holding that the Federal Circuit Court was without jurisdiction to construe and declare the meaning and effect of the terms and dispositions of a will which was then lodged in a State court to be there interpreted and construed, we beg to add the following considerations:

All the relief asked for by the complainant is predicated on *what she claims is the proper construction and legal effect of the will.*

First. The plaintiff admits that three other persons—Robert Waterman, Frederick Waterman and Frederick Tilton Davis—were legal coheirs with her when Mrs. Tilton died. But she contends that, as these three persons were named particular legatees in the will, and as they have accepted and received the bequests made to them respectively, they have thereby forfeited their right to assert any claim as legal heirs, by reason of a certain quoted provision of the will. The Federal Court was, therefore, requested to construe this clause in the will, to declare what its meaning and effect are, and to decide whether, in the sense the Federal Court gives it, that clause was intended to debar the three coheirs with the plaintiff from claiming as legal heirs if they accepted the special bequests to them.

Second. The plaintiff next requests the Federal Court to declare that a certain legacy in the will has lapsed, because the legatee is NONEXISTENT, and NEVER EXISTED. The Federal Court is thus invited to declare that, in a

given state of facts, a particular legacy is to be treated as a *lapsed legacy*, and to enforce the consequences which would attend a lapsed legacy. But this is a question as to the construction and effect of a term of the will. A lapsed legacy, as the term signifies, is one which conceivably might have had effect, but which circumstances make inoperative. But, where the situation is such that the legacy could never have had any effect, the disposition simply disappears from the will as if never written therein. If plaintiff is correct in her averment that no such institution exists, or ever existed, as the "*Home for Insane*," and that the terms of the will do not authorize the inference that the testatrix intended that the executor should found such an institution, then the entire disposition was wholly and always impossible, null and incapable of ever having effect. And the Federal Court is to determine whether this disposition has the status of a lapsed legacy; or whether, as a disposition made ON AN IMPOSSIBLE CONDITION—*i. e.*, payment to a nonexistent, never-existent person—it is a legacy subject to an impossible condition, to be simply "REPUTED NOT WRITTEN" (Rev. Civ. Code, Art. 1519), and, therefore, in no manner affecting the rights of anyone.

THIRD. The plaintiff also asks, in effect, that the Court decree that the legacy to the charitable institutions is not a conjoint universal legacy. For, if the legacy to the institutions is a conjoint universal legacy, then the lapse of any particular legacy would not benefit the plaintiff, but would go to the other conjoint universal legatees.

A decision in favor of the plaintiff could be reached only by first construing the will so as to hold that the legacy to the charitable institutions was not a conjoint universal legacy, and that the legacy to the "*Home for Insane*" was not a mere nullity, impossible of execution, and, therefore, to be reputed as not written in the will at all.

FOURTH. The plaintiff logically enough recognized that if the Federal Court would entertain his demand to construe the will, the only way to make its decree effective would be to assume entire control of the funds of the succession. Accordingly, she asked that the Federal Court determine what belonged to and composed the succession; what debts the succession owed, and what should be allowed for funeral expenses, costs of administration and legacies, and should give proper directions to effectuate a distribution in accordance with its findings on these matters.

The net result of the prayer of the bill is to request the Federal Court to take from a State Court the construction and interpretation of a document—a will—which had been filed and was physically in that court; to supersede the State Court in the interpretation and construction of the will; and to distribute the fund in accordance with its own views as to the legal import and effect of the will.

It is no answer to say that the proceedings to execute the will had not actually entered into the forensic pleadings and discussions that would be directly concerned with the question of the rights of the parties claiming

under the will. But the initial steps had been taken and had progressed far enough to give the State Court complete jurisdiction over the entire matter, as it should develop in regular and orderly procedure. The will was in court and had been ordered probated and executed. The property disposed of by the will was likewise in court. These preliminary steps having been taken, in due course of time, and in the proceedings prescribed, the questions as to the construction and meaning and effect of the will would arise and be settled. Just as the initial step in the establishment of a receivership gives the Court in which that initial step was taken jurisdiction over the corpus of the estate, so, the proper initial step having been taken in the State Court, jurisdiction vested in that Court to carry out to full completion the proceedings contemplated by the initial step.

In other words, the subject of the litigation had been taken up for decision in the State court; the document disposing of the property was in that court; the property to be disposed of was in that court, and the next step in orderly procedure would be the determination of the rights of the parties claiming interest in the property in court under the document filed in court, and which the Court had already decreed should be executed therein according to its legal meaning and effect. Is it conceivable that at this point a Federal Court has power to thrust its arm into the State court and withdraw the will and the estate from the State Court, and take upon itself the settlement of the entire *res judicadae,* and the settlement and distribution of the entire estate.

In the case of **Farrell vs. O'Brien, 199 U. S. 89**, Mr. Justice White, as the organ of the Court, after reviewing the various decisions upon the subject, sums up as follows:

> "Let us, then, first deduce the principles established by the foregoing authorities as to the power of a Court of the United States over the probate or revocation of the probate of a will. An analysis of the cases, in our opinion, clearly establishes the following:
>
> "First. That, as the authority to make wills is derived from the State, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of Courts of the United States.
>
> "Second. That, where a State law, statutory or customary, gives to the citizens of the State, in an action or suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity, the Courts of the United States, in administering the rights of citizens of other States or aliens, will enforce such remedies.
>
> * * * * * * * *
>
> "Having fixed the meaning of the words 'action of suit *inter partes*,' we come to apply the propositions deduced from the decided cases in order to test the question of the jurisdiction of the Circuit Court over the relief prayed for in the bill so far as relates to the annulment of the probate. This requires us to determine whether, by custom or by the statute law of the State of Washington, the Courts of that State had the power of administering the relief prayed for on that subject in the bill by an independent suit as distinguished from the exercise of probate jurisdiction originally or merely ancillary.

> There is no pretense of any custom in the State of Washington beyond the scope of the authority conferred upon the Courts of the State by the laws thereof. The question, therefore, reduces itself to a narrow compass—that is, what remedies do the laws of Washington create for the purpose of the probate of wills and the revocation of a probate, and are those remedies exclusively probate in their character, or necessarily merely ancillary thereto, or do they confer upon the State Courts general legal or equitable authority on the subject merely because of the existence of a controversy? That is to say, is a will contest under the laws of Washington an ordinary action or suit between parties, or a special probate proceeding directly ancillary to or concerning the probate of the will?"

And here follows a reference to the probate proceedings in the State of Washington.

Let us now refer to probate procedure in the State of Louisiana, and to the various laws and statutes conferring jurisdiction upon the Courts and providing for the method of exercising this probate jurisdiction.

Article 123 of the Constitution reads as follows:

> "The Civil District Court shall have exclusive and general original probate jurisdiction, and exclusive original civil jurisdiction, in all cases where the amount in dispute or the fund to be distributed shall exceed one hundred dollars exclusive of interest; and exclusive jurisdiction in suits by married women for separation of property, in suits for separation from bed and board, for divorce, for nullity of marriage, or for interdiction, and in suits involving title to immovable property, or to office or other public position, or civil or political rights; and in all other cases, except as hereinafter provided,

where no specific amount is in contest, and of all proceedings for the appointment of receivers or liquidators of corporations or partnerships. And said Court shall have authority to issue all such writs, process and orders as may be necessary or proper for the purposes of the jurisdiction herein conferred upon it."

Article 134 of the Constitution reads as follows:

"All cases, after being filed in said Civil District Court, shall be allotted or assigned among the Judges thereof, and, except as herein otherwise provided, each Judge, or his successor, shall have exclusive control over every case allotted or assigned to him from its inception to its final determination in said court. In case of vacancy in the office, recusation, absence or disability of a Judge to whom a case has been allotted or assigned, or in case such action is deemed advisable in the proper administration of justice or of the business of the court, such case may be reallotted or reassigned, or, without such reallotment or reassignment, but under rules to be adopted, it may be taken in charge by another Judge of said Court, and a Judge to whom a case is thus reallotted or reassigned, or by whom it is thus taken in charge, shall be authorized to act therein for all purposes as though such case had been originally allotted or assigned to him. Previous to the allotment or assignment of a case any Judge of said Court may, for the purposes of such case, make interlocutory orders and issue and grant conservatory writs and executory process. Applications for naturalization, for emancipation, and by married women for authorization when there is consent given and no issue joined, or where there is no contest, suits for nullity and for revival of judgment, and suits in which is claimed an interest in property or funds as to which a particular Judge has acquired jurisdiction, need

not be allotted or especially assigned, but shall be controlled by law or by rules to be adopted by the Court."

Article 924 of the Code of Practice reads as follows:

"PROBATE POWERS.

"Courts of probate have the exclusive power:

"1. PROBATE OF WILLS. To open and receive the proof of last wills and testaments, and to order the execution and recording them.

"2. APPOINT TUTORS, CURATORS, ETC. To appoint tutors and curators for minors, interdicted and absent persons who have no representatives in the State, and for such persons as are not capable of administering their own property.

"3. TO CONFIRM TESTAMENTARY NOMINATION OF TUTOR. To confirm or reject such tutors of minors as may have been appointed by the last will of their father or mother.

"4. TO APPOINT CURATORS. To appoint curators to vacant estates and absent heirs.

"5. TO ORDER INVENTORIES AND SALES. To grant orders to make the inventories and sale of the property of successions which are administered by curators or testamentary executors, or in which the heir prays for the benefit of inventory.

"6. TO CONFIRM NOMINATION OF TESTAMENTARY EXECUTORS AND ISSUE LETTERS. To homologate wills in which one or more testamentary executors are appointed, and to issue letters of administration to such executors.

"7. TO APPOINT DATIVE TESTAMENTARY EXECUTORS. To appoint one or more dative executors when the executor appointed by the testator will not or cannot perform the duties, or is dead or absent.

"8. To Remove Tutors, Curators, Etc. To remove or supply the places of such tutors, curators and testamentary executors in the cases provided by law.

"9. To Compel Administrators to Account. To compel such administrators to render an account when required or at the period fixed by law.

"10. To Interdict the Insane. To interdict persons who fall into a state of madness, and to restore them to the enjoyment of their rights when they regain their reason.

"11. To Compel Heirs to Accept or Reject Succession. To compel such heirs as have taken time to deliberate to declare, when required by the creditors of deceased, whether they accept or renounce a succession.

"12. To Put Heirs in Provisional Possession. To decide on the putting in provisional possession of the heirs of absentees.

"13. To Pass Upon Claims Against Successions and Homologate Accounts. To decide on claims for money which are brought against successions administered by curators, testamentary executors or administrators of successions, and to establish the order of privileges and mode of payment; *provided*, that their jurisdiction in suits in which a succession is either plaintiff or defendant shall not exceed five hundred dollars.

"14. To Partition Successions Among Heirs. To obtain and regulate all partitions of successions in which minors, interdicted or absent persons are interested, or even those which are made by authority of law between persons of lawful age and residing in the State, when such persons cannot agree upon the partition and mode of making it."

From the foregoing it will be seen that exclusive power over probate matters is given by the Constitution of 1898 and the statutes to the Civil District Court for the Parish of Orleans, of which there are five divisions, each division, however, retaining exclusive control from inception to final determination.

In passing we will call the attention of the Court to the fact that the aricles quoted from the Constitution of 1898—to wit, Articles 133 and 134—are identical with the articles contained in the Constitution of 1879.

In the case of **Denegre vs. Denegre, 33 An. 689,** suit was brought against an executor in a court other than the court in which the succession had been opened. The exception of jurisdiction *ratione materiae* was pleaded, and in passing on this exception the Court said:

> "No other Court could have entertained jurisdiction to construe the will of James G. Denegre, to ascertain and pass upon the claims of the parties asserted, the rights under or by virtue of it, to allow or reject money demands against the succession, to regulate the distribution of its assets among the creditors, legatees, heirs, as long as his legal representatives entitled to the residue of his estate did not place themselves in possession of its assets. All parties interested as legatees, as heirs or otherwise had a right to sue, and to be sued, *inter sese,* in the court seized of the settlement of the estate."

In **Succession of Burnside, 34 An. 730,** the Court said:

> "The relief asked depends exclusively upon the probate jurisdiction of the Court, and cannot be considered by a Court which has no such jurisdiction.

"It is well settled that the Federal Courts have no probate jurisdiction, a conclusion flowing from the existing legislation of Congress.

"This doctrine is recognized and favorably commented on by the United States Supreme Court in one of the cases quoted by appellee in support of his own opposite theory. *(Gaines vs. Fuentes*, 2 Otto, 18.)

"The following language, which we quote from that opinion, supports the conclusion which we have reached on this question: 'The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties. Indeed, in the majority of instances no such controversy exists. In its initiation all persons are cited to appear. * * * From its nature and from want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different States, of which the Federal Courts have concurrent jurisdiction with the State Courts under the judiciary act.'

"It is clear that this reasoning applies with equal force to all proceedings in the settlement of successions, and it is elementary that all conflicts between heirs, legatees or creditors of a succession, as well as between parties claiming contradictorily the right of administering a succession, are mere incidents of the settlement of the estate, and as such fall exclusively within the jurisdiction of a Court having probate jurisdiction, and in which the succession was opened."

From the articles of the Constitution and the articles of the Code of Practice, together with the decision in **Denegre vs. Denegre** and **Succession of Burnside**, quoted herein, it must be apparent that, under the laws of Louisiana, a contest or any other action looking to settle-

ment under the will can only be prosecuted in the court which has jurisdiction over the succession.

We, therefore, urge that the case at issue is entirely covered by the doctrine announced in **Farrell vs. O'Brien**, and is disposed of by the following language of the Court:

> "It follows that, as the Circuit Court of the United States had no jurisdiction to admit a will to probate or to entertain a pure probate proceeding, and as the remedy afforded by the laws of Washington to secure the probate or the revocation of the probate of a will were proceedings of a purely probate character, and not an action or suit *inter partes*, the Circuit Court of Appeals correctly decided that the Circuit Court, although there was diversity of citizenship, was without jurisdiction of the cause so far as the bill sought a declaration of the nonexistence of a will and the consequent nullity of the probate."

The proceedings for the revocation of the probate of the will, and the consequent nullity thereof, are necessarily analogous to proceedings to interpret the will, and are necessarily governed by the same principles.

In the instant case the parties are not denied any legal right. The proceedings are pending in the Probate Court, and the complainant has her standing in that court to enforce her rights.

In a case recently decided in the Circuit Court of Appeals for the Fourth Circuit—**Westfeldt vs. North Carolina Mining Company** (not yet published)—Chief Justice Fuller being the organ of the Court, the question of the

right of Federal Courts to interfere with litigation pending in State courts was fully considered, and the Court held that it was not competent for a Federal Court, on the ground of diversity of citizenship, to withdraw from the jurisdiction of the State Court any matter which was properly within the jurisdiction of that Court, and which that Court was proceeding in a regular way to determine.

A recent decision by this Court—**Prentis vs. Atlantic Coast Line,** November 30, 1908—also strongly illustrates the disinclination of this Court to permit Federal Courts to interfere with proceedings going on in State Courts, so as to withdraw from the State Court, on the mere ground of diversity of citizenship, any question properly and necessarily involved in proceedings before the State Court.

The authorities cited are, we submit, conclusive of this controversy. It is, therefore, respectfully submitted that the judgment of the lower Court should be maintained.

Respectfully submitted,

BRIEF FOR APPELLEES.

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EDGAR H. FARRAR,
JAS. McCONNELL,
CHAS. E. FENNER,
GEO. C. WALSH,
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Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

United States Supreme Court.

No. ~~538~~ 306.

MRS. FRANCES E. WATERMAN, WIFE OF CHARLES A. CRANE,

VERSUS

CANAL-LOUISIANA BANK AND TRUST COMPANY, EXECUTOR OF MRS. C. S. TILTON, *ET AL.*

BRIEF ON BEHALF OF CANAL-LOUISIANA BANK & TRUST COMPANY ET ALS., APPELLEES, IN REPLY TO QUESTION OF THE COURT.

WM. C. DUFOUR,
EDGAR H. FARRAR,
JAS. McCONNELL,
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United States Supreme Court.

No. 638.

MRS. FRANCES E. WATERMAN, WIFE OF CHARLES A. CRANE,

VERSUS

CANAL-LOUISIANA BANK AND TRUST COMPANY, EXECUTOR OF MRS. C. S. TILTON, *ET AL.*

BRIEF ON BEHALF OF CANAL-LOUISIANA BANK & TRUST COMPANY ET ALS., APPELLEES, IN REPLY TO QUESTION OF THE COURT.

"In this cause counsel for the respective parties are requested to file briefs on or before the first day of the next term of this Court upon the question whether Frederick Tilton Davis, averred in the bill to be a resident of the State of Alabama, and outside of the jurisdiction of the Court, is an indispensable party to the suit, and in his absence a dismissal of the cause required for want of jurisdiction in the Court to proceed without him."

The question propounded by your Honors suggests the propriety of an analysis of the bill filed in this cause.

THE SPECIFIC AVERMENTS.

On page 2 is to be found the following:

"That Caroline Stannard, widow of Frederick W. Tilton, late of the City of New Orleans and State of Louisiana, being possessed of and well entitled unto a considerable personal estate, duly made and published her last will and testament and codicils thereunto annexed, the said will bearing date New Orleans, January 1st, 1908, and the codicils bearing date February 1st and June 10th, 1908, and by said will and codicils the said Caroline Stannard, widow of Frederick W. Tilton, amongst other things and particular legacies to various persons, gave and bequeathed to Robert Waterman the sum of three thousand dollars ($3,000); to the said Robert Waterman and his wife fifteen (15) premium bonds; to Frederick Waterman three thousand dollars ($3,000), and to Frederick Tilton Davis one thousand dollars ($1,000) and the whole series of No. 5963 premium bonds, as will appear by the said will and codicils or the probate thereof, whereunto your oratrix for greater certainty craves leave at all times to refer and produce a copy of the same, marked 'Exhibit A,' herewith filed and made part of this bill."

On pages 2 and 3 is to be found the following:

"And your oratrix further shows unto your Honors that she is the sole surviving niece, Robert and Frederick Waterman and Frederick Tilton Davis the sole surviving nephews, of said Caroline Stannard Tilton; that there are no other persons within the nearest degree of kinship of the said testatrix, Caroline Stannard Tilton, and that the said Frederick Tilton Davis resides in the State of Alabama, and outside of Court's jurisdiction."

On page 3 is to be found the following:

"Your oratrix further shows unto your Honors that the said Robert Waterman, Frederick Waterman and Frederick Tilton Davis, legatees in the said testatrix's will named, became entitled to have and receive their said respective legacies, so bequeathed to them as aforesaid, and did receive said legacies, and accordingly, and by receiving said bequests, they have thereby renounced the succession of said Caroline Stannard, deceased widow of Frederick W. Tilton, and by taking said legacies have renounced all their rights as heirs at law, and are estopped and debarred from claiming any portion of the estate disposed of, and render themselves incapable of exercising the rights of legal heirs, under the following provisions of said will—to wit:

" 'Should any of the beneficiaries under the will object to the probate thereof, or in any way directly or indirectly contest, or aid in contesting, the same, or any of the provisions thereof, or distribution of my estate thereunder, then and in that event I annul any bequest heretofore made to such beneficiary, who shall be absolutely barred and cut off from any share in my estate.' "

On page 3 is to be found the following:

"That the above-recited clause of said will is legal, valid and binding upon said particular legatees, and, by reason of their renunciation and estoppel, your oratrix remains sole heir at law of Caroline Stannard Tilton, and as such became entitled to the shares which would have gone to Frederick and Robert Waterman and Frederick Tilton Davis, of the same degree in the collateral line by right of accretion."

On page 5 is to be found the following:

"And your oratrix further shows your Honors that she, and she alone, as the sole heir and next of kin of Caroline Stannard Tilton, is entitled to the sum of three thousand dollars ($3,000), caducously bequeathed to 'Home for Insane.' "

On pages 3 and 4 is to be found the following:

"That the bequest to 'Home for Insane' of three thousand dollars ($3,000), and the *pro rata* of the residue of the estate coming to said 'Home for Insane,' have lapsed, and the said sum of three thousand dollars ($3,000) and the *pro rata* of the residue have devolved upon your oratrix as sole heir and next of kin of said Caroline Stannard Tilton.

"That at the time of making said will and at the time of the death of said testatrix there was no such institution or corporation or person in existence, or known, as 'Home for Insane,' nor was the said testatrix capable of incorporating any institution as 'Home for Insane' under her said will, nor did she attempt so to do by the provisions thereof; and, as there was, and is, no such institution known as 'Home for Insane,' the said special legacy of three thousand dollars ($3,000) and the *pro rata* of the residue remain undisposed of, because the said alleged 'Home for Insane' has not been able and is incapable of accepting said legacy by reason of its nonexistence, and thereby said sum of three thousand dollars ($3,000) and the *pro rata* of proportion undisposed of devolve upon your oratrix, as sole legal heir and next of kin of said deceased, Caroline Stannard Tilton."

On page 4 is to be found the following:

"And your oratrix further shows unto your Honors that the bequest made to the Christan Woman's Exchange and the said *pro rata* of the residue does not devolve upon said Christian Woman's Exchange, because the bequest of one thou- Woman's Exchange is not a charitable bequest, and sand dollars ($1,000) made to said Christian the said Christian Woman's Exchange is not one of the various institutions designated or intended by said testatrix which is to share in the charitable bequests of the residue."

From these extracts from the bill the Court will note that the essential averments are:

First. The existence of a will and bequeathal of legacies thereunder.

Second. The existence of legal heirs of the deceased, the same being the complainant and Robert and Frederick Waterman and Frederick Tilton Davis.

Third. The averment of a legacy to a person incapable of inheriting, and the lapsing of said legacy by virtue of said incapacity.

Fourth. Acceptance of Frederick Tilton Davis of his special legacy subject to the terms and conditions of the will.

Fifth. The renunciation and abandonment by Frederick Tilton Davis of his rights as a legal heir because of his acceptance of said special legacy and the consequential sole right of complainant to the lapsed legacy and to all of the rights that might belong to the legal heirs.

Sixth. The plea of estoppel against Frederick Tilton Davis.

THE PRAYER.

On page 6 is to be found the following:

> "That it be further declared and decreed that Robert Waterman and Frederick Waterman have renounced and abandoned all their right, title and interest as heirs of said Caroline Stannard Tilton, deceased, in the said lapsed and caducous legacy made in favor of the so-called 'Home for Insane.'

"That it be further adjudged and decreed that your oratrix, as the nearest sole heir and next of kin of said Caroline Stannard Tilton, deceased, capable of inheriting, is alone entitled to the amount of the caducous and lapsed special legacy." * * *

And your Honors will note that the prayer asks for an accounting by the executor.

Your Honors will, therefore, see that the **relief specifically prayed for is:**

First. That the legacies to the "Home for Insane" be declared to have lapsed because of the incapacity of the parties to take.

Second. That said legacies be decreed the property of the legal heirs.

Third. That complainant be recognized as the sole heir.

Fourth. That the executor be condemned to pay over to complainant the whole amount of said legacy, together with the proportionate share in the residue.

Is Frederick Tilton Davis, therefore, an indispensable party to the proceedings? Can this Court grant the relief prayed for by the complainant without the presence of Frederick Tilton Davis?

The answer is: What decree is the Court asked to enter in this cause? It must be remembered that the bill filed in this case is of the complainant's own making, and the allegations are her own.

She has not seen fit to confine herself to litigating her rights against the executor of the estate; she has gone further, and has litigated her rights against her coheir parties, in whom the executor has no interest beyond seeing to a proper payment.

This bill properly presents two causes of action:

(a) A cause of action against the executor to establish the invalidity of certain legacies.

(b) A cause of action by one legal heir against other legal heirs and the executor, seeking to control the distribution of property, and **seeking quoad the executor possession of the entire fund sought to be recovered.**

The mere fact that the two causes of action are combined in one in no sense changes the grouping of the parties, and any judgment rendered in accordance with the prayer of the complainant would be a judgment on the rights of Frederick Tilton Davis without his presence and without his knowledge.

Frederick Tilton Davis is admitted to be a legal heir. The property, if recovered, is admitted to be the property of the legal heirs. Therefore, should the complainant be successful in the issue of the lapsed legacy, Frederick Tilton Davis would be called as a legal heir to take his proportion of the estate.

"But," says the complainant at this stage of the proceedings, "he cannot take. He is an heir, and the heirs are entitled to property; but he is estopped because he has done something which prevents him from so taking."

Frederick Tilton Davis has a perfect right to reply to

this charge. and, having been averred to be one of the legal heirs, he has a right to reply at the time that the other heirs reply and urge his defense at a time when he can be protected.

No charge is made against Frederick Tilton Davis, except that he took his special legacy, and, therefore, is deprived from attacking the will. It is averred that this taking forces him into a recognition of the legacies to the "Home for Insane" and "Christian Woman's Exchange," and that by such action he must always recognize their rights, even if the Court should determine that they have no rights. Might not Frederick Tilton Davis, if made a party defendant in a proper court, come into the court and say:

> "I am a legal heir of Mrs. Tilton. Under her will, I received a legacy, and I accepted this legacy under the will. It now develops that the parties to whom certain legacies were made are not entitled to these legacies, and, by operation of law, these legacies revert to the legal heirs. I have not attacked the will, but if, by operation of the law, and through a legal interpretation of the will, I am entitled to an additional sum, I want it."

Certainly, Frederick Tilton Davis would have a right to argue that question before the Court.

Undoubtedly, the executor, against whom the complain ant seeks a judgment decreeing the payment of the entire alleged lapsed legacy and its proportion in the residue, has a right to require that he be before the Court when the issue is tried.

This question of jurisdiction has evidently impressed itself upon the complainant, and the bill seems to have been drawn with a particular view of meeting the issue, if raised. The Court will note that no citation is prayed against Frederick Tilton Davis, nor does the prayer directly ask for a decree that Frederick Tilton Davis had renounced and abandoned all of his right and title, but impliedly does so by praying:

> **"That it be further adjudged and decreed that your oratrix, as the sole heir and next of kin of said Caroline Stannard Tilton, deceased, capable of inheriting, is alone entitled to the amount of the caducous and lapsed legacy."**

This section of the prayer, taken in connection with the direct averment concerning renunciation by Frederick Tilton Davis, is a **prayer for a decree materially** and **injuriously affecting his rights** and those of the executor. The effect of a judgment decreeing complainant to be the sole heir, and "alone entitled to the amount of the caducous and lapsed special legacy," and the proportionate part of the residue, would be to declare that Frederick Tilton Davis had abandoned and renounced his rights as a legal heir.

Applying to this state of facts the principles in equity announced by this Court, this bill must be dismissed.

In **Minnesota vs. Northern Securities Company, 184 U. S. 199,** your Honors, after reviewing the authorities, reasserted the rule in equity in these words:

> "The general rule in equity is that all persons materially interested, either legally or beneficially, in

> the subject-matter of a suit, are to be made parties to it; and the established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter, who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the Court *sua sponte*, though not raised by the pleadings or by counsel."

And in the same opinion, and citing **Shields vs. Barrow, 17 Howard, 30,** your Honors crystallized the test in these words:

> "There are three classes of parties to a bill in equity. They are:
>
> "1. Formal parties.
>
> "2. Parties having an interest in the controversy, and who ought to be made parties in order that the Court may act on that rule. * * *
>
> "3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

Testing the averments of this bill and the extent of the relief prayed for by these principles, what have we?

1. Frederick Tilton Davis is a person materially interested.

2. The decree prayed for would not only injuriously affect Frederick Tilton Davis, but would adjudge another to be the owner of his property.

3. Frederick Tilton Davis can in no sense be considered only a formal party against whom a final decree can not be rendered without affecting a direct interest.

In Garzot vs. de Rubio, 209 U. S., 283, your Honors had before you a probate matter analogous to the instant case. The question involved the adjustment of the community between a widow and children—the property having been derived solely from the first husband. The children of the second marriage were not made defendants in the bill, and the Court dismissed it on the ground that they were interested and necessary parties, and the suit could not proceed without them. In disposing of the question the Court reasserted the rule in equity quoted by us from **Minnesota vs. Northern Securities Company,** and, in applying the principle, held that the test of the necessity of the parties before the Court involved an analysis of the averments of the bill and the relief prayed for, and said:

> "A bill in equity to set aside an agreement adjusting a community between the widow and children, brought after the death of the widow, who had also left children by a second marriage, held in this case to be a liquidation of the community; and, although the property was derived solely from the first husband, the children of the second marriage were, as heirs of the mother, interested in her share and necessary parties to the bill."

Again, in **Minnesota vs. Northern Securities Co., p. 237,** the Court had occasion to pass upon the application of the **Forty-seventh Rule in Equity** concerning the right of a court of equity to proceed without an indispensable party, and your Honors held:

> "The act says it shall be lawful for the Court to entertain jurisdiction; but, as is observed by this

Court in **Mallow vs. Hinde, 12 Wheat. 193, 198**, when speaking of a case where an indispensable party was not before the Court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity whatever may be their structure as to jurisdiction. We put it on the ground that no Court can adjudicate directly upon a person's right without the party being either actually or constructively before the Court.' So that, while this act removed any difficulty as to jurisdiction between competent parties regularly served with process, it does not attempt to displace that principle of jurisprudence on which the Court rested the case last mentioned. And the forty-seventh rule is only a declaration for the government of practitioners and courts of the effect of this act of Congress and of the previous decisions of this Court. **(Hogan vs. Walker, 14 How. 36.)**

"It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far as involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights."

We suggest, therefore, that, as Frederick Tilton Davis is an indispensable party to these proceedings, the complainant cannot seek refuge behind the Forty-seventh Rule in Equity and have any of the rights herein suggested litigated.

The provisions of the **Civil Code of Louisiana** upon the question of forfeiture and renunciation by legal heirs are both instructive and applicable. They go to show the

zealousness with which the law safeguards the rights of heirs and the impossibility of any action against the heir without his presence.

Under the principle of the civil law, "*Le mort saisit le vif,*" the legal heir is called to the estate immediately after the death of the deceased whom he succeeds. He can only be denied his rights by:

1. The existence of a will by which the testator has disposed of his property.

2. His incapacity or unworthiness.

He can voluntarily renounce his rights.

Article 940 of the Code reads:

> "A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.
>
> "This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees."

The right mentioned in the preceding article exists long before the heir has taken steps to put himself in possession or has expressed willingness to accept. It arises by the operation of the law. Therefore, at the moment of the death of Mrs. Tilton, Frederick Tilton Davis and the other legal heirs were called to the estate, and their rights subsisted until the happening of one of the conditions cited *supra,* or the voluntary renunciation of all or either of them. The case at bar presents no question of incapacity or unworthiness.

The sole question is that of renunciation and abandonment by estoppel.

The **law of renunciation** is to be found in **Article 1014**, which reads as follows:

> "He who is called to the succession, being seized thereof in right, is considered the heir as long as he does not manifest the will to divest himself of that right by renouncing the succession."

Therefore, assuming that the decision of the lower Court is reversed and the Court takes jurisdiction, the Court will, on the trial of the merits, be called upon to pass upon a man's rights on an averment of estoppel, and this in the face of the article of the Code providing that renunciations must be expressed.

In the cases of incapacity and unworthiness the provisions of the Code are equally as specific. **Article 967**, dealing with incapacity, reads:

> "The unworthiness is never incurred by the act itself; it must be pronounced by the Court in a suit instituted against the heir accused of unworthiness after he has been duly cited."

Article 1017, dealing with unworthiness, reads as follows:

> "The renunciation of a succession is not presumed; it must be made expressly by public act before a notary in the presence of two witnesses."

We submit that the averments and prayer of the bill ask relief materially and injuriously affecting the rights of Frederick Tilton Davis.

We submit that under the jurisprudence of this Court such proceedings demand the presence of Frederick Tilton Davis.

We submit that under the law of Louisiana no such proceedings could be had without the presence of Frederick Tilton Davis.

We respectfully submit that the bill should be dismissed for want of jurisdiction in the Court to proceed without him.

Respectfully submitted,

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